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CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. ~~930~~ 137

JOSEPH B. STRATON, RAYMOND FLESHMAN, AND RANDOLPH BIAS, SPECIAL COMMISSIONERS OF THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA, APPELLANTS,

versus

ANDY NEW, JR., TRUSTEE IN BANKRUPTCY OF FALL BRANCH COAL COMPANY, A CORPORATION, BANKRUPT, FIRST NATIONAL BANK OF BLUEFIELD, A BANKING CORPORATION, AND EDWIN MANN, AND ALL OTHERS SIMILARLY SITUATED, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT BLUEFIELD. IN BANKRUPTCY.

On a Certificate from the United States Circuit Court of Appeals for the Fourth Circuit.

Filed

Office Supreme Court, U. S.
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United States Circuit Court of Appeals

Fourth Circuit.

No. 2847.

Joseph B. Straton, Raymond Fleshman and Randolph Bias, Special Commissioners of the Circuit Court of Mingo County, West Virginia, Appellants,

versus

Andy New, Jr., Trustee in Bankruptcy of Fall Branch Coal Company, a corporation, Bankrupt, First National Bank of Bluefield, a banking corporation, and Edwin Mann, and all others similarly situated, et al., Appellees.

Appeal from the District Court of the United States for the Southern District of West Virginia, at Bluefield.

Question certified to the Supreme Court of the United States by the Circuit Court of Appeals of the Fourth Circuit on the case stated.

STATEMENT OF FACTS.

This is an appeal from an order entered in the bankruptcy proceedings of the Fall Branch Coal Company enjoining commissioners, appointed by a West Virginia

state court, from proceeding with the sale of certain property of the bankrupt as ordered by the decree of that court. The petitioners in the court below, upon whose plea the injunction was granted, were the trustees in bankruptcy of the coal company, the First National Bank of Bluefield and one Edwin Mann,—the last two being holders of mortgages or deeds of trust upon the coal company's property. The petition sets forth that the commissioners were advertising for sale only the property of bankrupt situate in West Virginia, that it would be advantageous to all parties to have this property sold in connection with property of bankrupt situate in Kentucky, and that the bankruptcy court had exclusive jurisdiction to make the sale. The commissioners, in their answer, denied the right of the District Court to enjoin the proceedings in the state court, and from the order awarding the injunction appealed.

The facts with regard to the suit in the state court are as follows: One Paul Z. Alley, on April 11, 1927, obtained a judgment against the coal company in the Circuit Court of Mingo County, West Virginia, which was duly docketed on May 5, 1927, in the county clerk's office and thereupon became a lien upon its real estate situate in that county. On February 20, 1928, he filed in that court against the coal company a judgment creditors' suit, making parties thereto all creditors having liens upon its real estate, including the First National Bank of Bluefield and Edwin Mann, and asked that the liens and assets he marshalled and that the real estate of the coal company in Mingo County be sold and the proceeds thereof be distributed among the lien claimants in accordance with their respective rights. The cause was duly matured, and at the April term, 1928, was referred to a commissioner in chancery to report the real estate owned by the coal company and the liens thereon. At the July term, 1928, the commissioner made his report and thereupon three commissioners were appointed to make sale of the property. On August 4, 1928, sixteen months after the rendition of one of Alley's judgments and five and one-half months after the filing of the creditors' bill, the coal company filed its voluntary petition in bankruptcy; and on October 11th following,

while the commissioners of the state court were proceeding to carry out its order of sale, the trustee in bankruptcy with the First National Bank of Bluefield and Edwin Mann filed the petition to enjoin them from proceeding further.

Being divided and in doubt, this Court respectfully certifies to the Supreme Court of the United States for its instruction and advice, the following question of law the determination of which is indispensable to a proper decision of the case.

QUESTION.

Where creditors have obtained and docketed judgments constituting liens on the real estate of defendant, and have instituted a creditors' suit in a state court to marshal and enforce the liens and sell the real estate subject thereto, does the bankruptcy of defendant occurring more than four months after the institution of the creditors' suit oust the state court of jurisdiction, or vest in the court of bankruptcy power to enjoin further proceedings in the state court?

Judge Waddill presided at the hearing of this case, but on account of illness has been unable to confer with regard to same or to join in this certification.

May 9, 1930.

JOHN J. PARKER,
U. S. Circuit Judge.

ELLIOTT NORTHCOTT,
U. S. Circuit Judge.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, CLAUDE M. DEAN, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the aforegoing is a true copy of the original certificate of the question of law to the Supreme Court of the United States in the therein entitled cause filed and now remaining of record in the said United States Circuit Court of Appeals.

IN TESTIMONY WHEREOF, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, on this 13th day of May, A. D., 1930.

(Seal of Court)

CLAUDE M. DEAN, Clerk,
U. S. Circuit Court of Appeals,
Fourth Circuit.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 137

JOSEPH B. STRATON, RAYMOND FLESHMAN, AND RANDOLPH BIAS, SPECIAL COMMISSIONERS OF THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA,

versus

ANDY NEW, JR., TRUSTEE IN BANKRUPTCY OF FALL BRANCH COAL COMPANY, A CORPORATION, BANKRUPT; FIRST NATIONAL BANK OF BLUEFIELD, A BANKING CORPORATION, AND EDWIN MANN AND ALL OTHERS SIMILARLY SITUATED ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT BLUEFIELD. IN BANKRUPTCY.

On a Certificate from the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR JOSEPH B. STRATON ET AL.

RANDOLPH BIAS,
Counsel for Joseph B. Straton et al.,
Williamson, West Virginia.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 137

JOSEPH B. STRATON, RAYMOND FLESHMAN, AND RANDOLPH BIAS, SPECIAL COMMISSIONERS OF THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA,

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Opinions Below.

No opinion was rendered by the Circuit Court of Appeals, for the reason, as stated by it in the certificate, it was divided and in doubt.

The District Court rendered no opinion, but merely perpetuated the injunction it had theretofore issued, restraining the appellants, officers of the state court, from executing a decree of sale, entered in the creditors' suit in the state court.

Jurisdiction.

The certificate of the Circuit Court of Appeals was filed in this Court on May 22nd, 1930.

Jurisdiction is conferred by U. S. C. A., Title 28, Sec. 346 (originally Section 239, Judicial Code).

Question Presented.

As certified by the Circuit Court of Appeals, a single question is presented:

> "Where creditors have obtained and docketed judgments constituting liens on the real estate of defendant, and have instituted a creditors' suit in a State Court to marshal and enforce the liens and sell the real estate subject thereto, does the bankruptcy of defendant occurring more than four months after the institution of the creditors' suit oust the State Court of jurisdiction, or vest in the Court of Bankruptcy power to enjoin further proceedings in the bankruptcy court?"

Statement.

The certificate from the Circuit Court of Appeals (page 2) recites all the pertinent facts, which, briefly, are these:

(*a*) In April, 1927, Alley obtained a judgment against the Coal Company, now the bankrupt.

(*b*) This judgment was docketed May, 1927, and thereupon became a lien on the real estate of the Coal Company, situate in the county where docketed.

(*c*) February 20, 1928, Alley instituted a creditors' suit to sell the land to satisfy the liens, including his own and those of the two appellees herein, the bank and Mann.

(*d*) In July, 1928, appellants were by the State Court appointed commissioners and directed to sell the land and pay the liens.

(*e*) On August 4, 1928, sixteen months after Alley's judgment was rendered, fifteen months after it became a lien, and five and one-half months after the creditors' suit was instituted, the Coal Company filed a voluntary petition in bankruptcy.

(*f*) On October 11, 1928, while appellants were proceeding to carry out the order of sale, the District Court, upon the petition of appellees (the trustee in bankruptcy and the two lien creditors, the bank and Mann), enjoined the commissioners from proceeding further.

(*g*) This injunction was later perpetuated and an appeal, in due form and time, taken.

BRIEF OF THE ARGUMENT.

1. A Federal district court in a bankruptcy proceeding cannot enjoin nor stay a suit in a State court of competent jurisdiction instituted more than four months before the bankruptcy petition was filed, where the purpose of the suit in the State court is to enforce a lien not dissolved by the bankruptcy.

Metcalf Bros. *v.* Barker, Trustee, 187 U. S. 165 (47 Law. Ed. 122);

Pickens *v.* Dent Roy, 187 U. S. 177 (47 Law Ed. 128);
Taylor *v.* Taylor, 59 N. J. Eq. 86 (45 A. 440);
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Griffin *v.* Leonard, 266 F. 671;
Abney-Barnes *v.* Davy-Pocahontas Coal Co., 83 W. Va. 292 (98 S. E. 298).

2. The trial court plainly erred in divesting the State court of jurisdiction, or seeking so to do, by the writ of injunction; and its order should have dissolved the injunction and dismissed the petition. What the trial court should have done the Circuit Court of Appeals should now do, and the question should be answered in the negative.

ARGUMENT.

A. The Facts.

A single question is involved. This question is so plain and simple, and the answer to it so obvious, it should have been seen by the trial court. The trial court could not, or did not see it. Hence this appeal. That question is this: Can a bankruptcy court by injunction divest a state court of jurisdiction in a creditors' suit to enforce a lien not affected by the bankruptcy, where the state court assumed jurisdiction more than four months before the petition in bankruptcy was filed? This question has been answered

in the negative so often it would seem no court could now err in answering it. So far as we can learn from a more or less exhaustive examination of the cases the holding has been uniform. The holding has been repeatedly made by this Court, by district courts, and circuit courts of appeal.

Alley, a creditor of Fall Branch Coal Company, reduced his debt to judgment on April 11, 1927, and recorded his judgment promptly, thereby perfecting a lien on all West Virginia real estate of the judgment debtor. Being unable to collect his judgment by execution, he brought a chancery suit to subject the real estate to sale in satisfaction of all liens on it, including his own and those of the appellees, the bank and Mann. He brought this suit on February 20, 1928. The suit took the regular course and the state court, having complete jurisdiction, in July, 1928, pronounced a decree of sale, describing the real estate to be sold (all in West Virginia) and the liens to be paid from the proceeds of the sale. To make the sale it appointed the appellants here as Special Commissioners, and placed them in custody of the real estate, directing sale thereof, payment of costs, and disbursement of the proceeds to lienors in the order of their priorities. This gave the Special Commissioners the same custody and possession of the real estate, and control over it, as if a receiver had been appointed and placed in control.

> "A Special Commissioner, under our law and practice, is of practically the same legal status as a receiver." Boylan v. Hines (W. Va.), 59 S. E. 503.

Assuming the duties, and having executed a bond for the proper discharge thereof, the Special Commissioners (appellants here) now having the real estate in custody, proceeded to discharge the requirements of the decree.

Meanwhile, on August 4, 1928, the judgment debtor, the coal company (the bankrupt here), filed its voluntary petition in bankruptcy. In its schedule of liabilities it listed the debt owing Alley and the debts owing the appellees, the bank and Mann. These creditors, and presumably all other creditors, proved their claims in the bankruptcy court.

Thus we see (*a*) Alley's judgment rendered sixteen months before the bankruptcy petition was filed was not affected by, nor dissolved by, the bankruptcy. U. S. C. Title 11 (bankruptcy) Sec. 107; (*b*) and that the suit to enforce the lien of the judgment was instituted five months and twelve days before the petition in bankruptcy was filed. Under the law, as we are hereafter to see, the bankruptcy proceedings did not and do not terminate the suit in the state court nor permit the federal court to stay that suit nor divest the state court of the custody of the property. A federal court of concurrent jurisdiction with a state court can not at such juncture, and in such way, oust the state court of jurisdiction. The attempt to do it is an unwarranted interference of one court with the orderly processes of the other. Each has its functions, duties, rights and powers, and in the exercise and discharge of these should be free from encroachment upon, or interference by the other. Comity re-

quires it. Our dual system of government demands it. The fact the two courts cover or occupy the same territory in nowise gives the one control over, or supervision of the other. They comprise parts of different systems, operate in different planes and each is, and of necessity must be, wholly free from the processes, injunctive and otherwise, of the other so long as it has jurisdiction and recognizes its limits and the jurisdiction of the other. The bankruptcy statute did not, and does not, abrogate this principle. The federal constitution authorizes a bankruptcy law, but it does not authorize abolition of state courts, nor permit courts of bankruptcy to divest state courts of their jurisdiction beyond the field occupied by federal legislation.

Notwithstanding these facts, and in spite of repeated decisions of this Court to the exact contrary, the bankruptcy court, by its injunction, seeks to take from the custody and control of the state court of undoubted jurisdiction, real estate of the bankrupt, and compel the state court to cease to exercise its jurisdiction.

It is of this we complain and we respectfully, but earnestly, insist that under the facts as shown by the record here to exist, the law forbids this, and calls for reversal of the trial court.

B. The Law.

A Federal district court in a bankruptcy proceeding can not enjoin nor stay a suit in a state court of competent jurisdiction, instituted more than four months

before the bankruptcy petition was filed, where the purpose of the suit in the state court is to enforce a lien not dissolved by the bankruptcy.

Under the authority of the federal constitution, Article I, Section 8, Subsection 4, the Congress has enacted an uniform bankruptcy law. By Article III, Section 2, the judicial power of the federal courts is made to extend to all cases arising under the laws of the United States, and hence to the bankruptcy laws. But such delegated authority and such exercise thereof in no sense denies to the several states and their courts the right to administer the laws in general and to try equity causes. Necessarily, the federal courts and the state courts operate in the same territory and upon the same people. The result is that sometimes there comes a conflict of jurisdiction—there arises a question as to which court, federal or state, has jurisdiction of the person or the thing. In such cases care must be exercised to avoid a clash of authorities. This court frequently has been called upon in such cases, and, so far as we can observe, has established a rule for all courts to follow. In Peck *v.* Jenness, 48 U. S. 611 (12 Law. Ed. 841), the court said:

> "It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to

prosecute his suit in it, have once attached, that right can not be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other:"

"The fact, therefore, that an injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum."

As between courts of the same system this rule is called comity—a matter of convenience and of having a decent regard for the actions of others; but as between federal courts on the one hand and state courts on the other, it has been said to be more than a rule of convenience, and is called a principle of right, of necessity, and of law.

In Covell *v.* Heyman, 111 U. S. 176 (28 Law. Ed. 390), Mr. Justice Mathews speaking for the court said:

"The forbearance which courts of coordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity with perhaps no higher sanctum that the utility which comes from concord; but between State Courts and those of the United States, it is something more. It is a principle

> of right and of law, and, therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent and have no common superior. They exercise jurisdiction, it is true, within the same territory but not in the same plane; and when one takes into its jurisdiction a specific thing, that *rès* is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void."

In Wabash Railroad Company *v.* Adelbert College, 208 U. S. 38 (52 Law. Ed. 379), this Court, speaking through Mr. Justice Moody, said:

> "When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it. For the purpose of avoiding injustice which might otherwise result, a court during the continuance of its possession has, as incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession, or the control of the property. In the courts of the United States this inci-

dental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship or the nature of the controversy. Those principles are of general application, and not peculiar to the relations of the courts of the United States to the courts of the state; they are, however, of especial importance with respect to the relations of those courts, which exercise independent jurisdiction in the same territory, often over the same property, persons, and controversies; they are not based upon any supposed superiority of one court over the others, but serve to prevent a conflict over the possession of property, which would be unseemly and subversive of justice; and have been applied by this court in many cases, some of which are cited, sometimes in favor of the jurisdiction of the courts of the states and sometimes in favor of the jurisdiction of the courts of the United States, but always, it is believed, impartially and with a spirit of respect for the just authority of the states of the Union."

One of the latest expressions of this court, which shows how consistently it has followed this rule, is that of Mr. Chief Justice Taft in Harkin *v.* Brundage, decided February, 1928, and reported 276 U. S. 36 (72 Law. Ed. 457), in which case the court reversed both the district court and the circuit court of appeals of the Seventh Circuit. There was a controversy between the Illinois State Court and the federal district court for the Northern District of Illinois as to which had jurisdiction in a receivership proceeding. The

bill was filed in the state court five days before one was filed in the federal court. The federal receiver obtained actual possession of the property and there was question as to whether the receiver for the state court at the time had constructive possession. The trial court and Circuit Court of Appeals held the district court had jurisdiction. In reversing them the Chief Justice said:

> "The principle which should govern in a conflict of jurisdiction like this has been a number of times stated by this court. As between two courts of concurrent and coordinate jurisdiction, the court which first obtains jurisdiction and constructive possession of property by filing the bill is entitled to retain it without interference and can not be deprived of its right to do so, because it may not have obtained prior physical possession by its receiver of the property in dispute; but where the jurisdiction is not the same or concurrent, and the subject-matter in litigation in the one is not within the cognizance of the other, or there is no constructive possession of the property in dispute by the filing of a bill; it is the date of the actual possession of the receiver that determines the priority of jurisdiction."

Two other cases which will illustrate the principle and the rule are Murphy *v.* John Hofman Company, 53 Law. Ed. 326, and Taubel-Scott-Kitzmiller Company *v.* Fox *et al.*, 68 Law. E. 772.

Ordinarily, the rule is invoked and applied when a federal court is said to encroach on the jurisdiction of

a state court; but it is just as applicable when the state court is the aggressor.

On principle there is as much right in a state court to enjoin a federal court or its officers as there is in the latter to stay or enjoin the former. In the instant case there was as much, or even greater right in the state court to enjoin the federal court and its trustee in bankruptcy from disturbing the state court and its officers in their possession of the *res*—the real estate. This real estate was and is in *custodia legis*, the actual custody of these appellants, and there was and is greater right in the state court to employ its injunctive process to restrain the bankruptcy court and its trustee from disturbing the officers of the state court, these appellants, in their custody of the property. This is precisely what was done, by indirection, by the Georgia Court in Strickland *v.* Darsey, 156 Ga. 717, 120 S. E. 7, 32 A. L. R. 974. As in that case a superior court of Georgia enjoined a creditor from proving as a lien his claim in a bankruptcy proceeding instituted more than four months after the original petition was filed and a receiver was appointed in the state court, and the Georgia Supreme Court affirmed the superior court.

If the federal court may enjoin the state court, then the state court may enjoin the federal court and neither court nor litigant in either gets anywhere. It is to avert and avoid such an intolerable and impossible situation that the rule, sometimes called comity, sometimes called rule of necessity, or rule of law, was made and is applied, followed and observed—and is here invoked.

But it may be argued, the Congress has said injunctions may issue in bankruptcy proceedings. That is true, but the Congress by implication, and this court has repeatedly said, in direct expression, when and only when an injunction may issue to restrain a proceeding in a state court—and the plain implication and direct expression forbid its use in the instant case.

There are those who, for some inexplicable reason, contend the cases *In re* Watts, 190 U. S. 1 (47 Law. Ed. 933), U. S. F., and G. Company *v.* Bray, 225 U. S. 205 (56 Law. Ed. 1055), and Bailey *v.* Blackmon, 14 F. (2nd) 16, authorize an injunction in this case, and in similar cases. An analysis of the cases shows the contention unfounded in fact and unwarranted in law.

The opinion in *Re* Watts and in *Re* Sachs was written by Mr. Chief Justice Fuller in May, 1903, less than six months after he had written the opinions in Metcalf *v.* Barker, 187 U. S. 165 (47 Law. Ed. 122), and in Pickens *v.* Roy, 187 U. S. 177 (47 Law. Ed. 128). The court was unanimous in all three decisions—there was no dissent. These last two named cases are decisive of this case, as we are hereinafter to point out. In them the court in simple and unmistakable language expounded the law, as set out in the proposition at the beginning of this argument on the law. Despite this fact, and the fact the seven then sitting associate justices all concurred with the Chief Justice in this opinion in these two cases, it is argued now that the Chief Justice and the still acting six associate justices did an about-face and reversed themselves in the Watts case, decided less than six months later! (It should be noted (*a*), Mr. Justice Gray died September 15, 1902, and

that his successor, Mr. Justice Holmes, was not appointed until December 4, 1902, and that (*b*) therefore only seven associates were sitting when the Metcalf *v.* Barker and Pickens *v.* Roy cases were decided, and (*c*) that Mr. Justice Shiras after these decisions, and on February 23, 1903, resigned and that his successor, Mr. Justice Day, was sworn in March 2, 1903, and that (*d*) therefore the Chief Justice and Justices Harlan, Brewer, Brown, White, Peckham, and McKenna concurred in all these opinions.) It is impossible the seven men could, or would in six months all change their minds on what is the law—and they did not do it, and the opinion *In re* Watts does not say they did.

The most frequently quoted portion of the opinion cited in support of the contentions made, carries its own refutation of the contention. It is: "The bankruptcy law is paramount, and the jurisdiction of the Federal Courts in bankruptcy, *when properly invoked*, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive." The italics are supplied by us to point out the refutation to the contention. *When properly invoked* comprehends and contemplates the jurisdiction will be and is *invoked at a proper time*—and a (*the*) proper time is within four months after the state court suit is brought to enforce a lien not affected by the bankruptcy. That is what it means and what the court meant and all that could be meant. When we examine the facts and carefully read the court's opinion this is too clear to admit of argument.

The Watts case was essentially a contempt proceeding against an attorney and only incidentally a bank-

ruptcy case. Moreover, and of decisive importance, these are the facts as to the four months' rule, or the four months' period: The proceedings in the state court started December 29, 1902, and the petition in bankruptcy was filed just five weeks later, on February 6th, 1903. Therefore the four months' period had no application and the decisions in the Metcalf and Pickens cases were not applicable, and not being applicable, not mentioned in the Watts opinion. It is impossible to see how that opinion reverses, distinguishes, or in any wise modifies the opinions in the other two cases. True it is some district courts have (and perhaps a circuit court of appeals has) held the Watts case, decided after the 1903 Amendments to the Bankruptcy Statute, disaffirms the earlier decisions of the same court; but we respectfully submit such conclusions are erroneous. The facts were wholly unlike on the essential point (the four months' period) now under consideration, and we are unable to find anything in the amendments of 1903 at all applicable to the Watts case and the decision in it, and certainly there is nothing in the 1903 amendments applicable to the instant case.

In United States Fidelity & Guaranty Company *v.* Bray, *supra*, the controversy was between two federal courts, the bankruptcy court the first to start in motion, and the question of the four months' period did not arise at all. We are unable to see how this decision can be found to have any application to the instant case.

In Bailey *v.* Blackmon, 14 F. (2nd) 16, these important facts are significant:

(*a*) A petition in Bankruptcy was filed by Bailey on September 3, 1921;

(*b*) An injunction issued from the bankruptcy court to restrain the bankrupt, his wife, and his daughter from making any disposition of his property, on September 6, 1921;

(*c*) On November 1, 1921 (almost two months *after* bankruptcy proceedings started), the state court proceeding started;

(*d*) On the next day, November 1, 1921, Bailey was adjudged a bankrupt.

The question involved in this case was not involved there at all; and the four months' period has no application.

Moreover, the Circuit Court of Appeals, in that opinion, took pains to say that which clearly shows the law of that case when applied to this case, that the trial court erred in perpetuating the injunction.

Judge Waddill, speaking for the court, said:

> "To prevent misapprehension, it should be stated that nothing in what has been said in any way questions the right of the state court to entertain the foreclosure suit, in spite of the fact that it was begun nearly two months after the filing of the petition in bankruptcy. The right of the mortgagees in it to enforce their lien was not affected by the fact that the title to one of the junior lienors arose out of an assignment of the bankrupt. It may also be admitted that when the state court in the foreclosure proceedings took possession of the mortgaged property, put it up for sale, and took the proceeds into

> its hands, it was by the ordinary rules of law bound to hear any one claimed to be interested in them. If there were conflicting claims upon any part of the funds, it ordinarily had jurisdiction to pass upon them, and, without its consent, no court of merely concurrent jurisdiction could in any wise interfere. The question of whether Miss Bailey or the trustee in bankruptcy had the better claim to the third lien on the property in process of foreclosure was, however, altogether separable from every other question in the case. It was one which in its nature would ordinarily have been within the jurisdiction of the court of bankruptcy. Moreover, before the institution of the suit in the state court, the court of bankruptcy had begun its inquiry into some of the conveyances from the bankrupt to his daughter, and in addition had issued its injunction to prevent the alienation of the property dealt with in them."

The Bailey *v.* Blackmon opinion cites a number of cases, now to be briefly examined.

A. New River Coal and Land Company *v.* Ruffner, 165 F. 881. In this case the suit in the state court started February 7, 1907. The petition in bankruptcy was filed forty-six days later, on March 25, 1907; and on April 18, 1907, the bankruptcy was adjudicated. In this opinion, the court, with Judge Waddill concurring, said:

> "The whole proceeding in the state court from the commencement of the action was within four months from the filing of the petition in bankruptcy, and of the adjudication of the Cataract Colliery Company a bankrupt."

B. Virginia Iron Coal and Coke Company *v.* Olcott, 197 F. 730: In this case the petition in bankruptcy was filed in New York on August 3, 1910, and a receiver appointed. A supplemental petition was filed in North Carolina on August 10, 1910, and the New York receiver made ancillary receiver in North Carolina. "Thereafter" the company was adjudged a bankrupt. On October 25, 1910, upon petition asking permission of the North Carolina bankruptcy court so to do, certain creditors "thereupon" brought suit in the North Carolina state court.

It is true that in this case Judge Pritchard, speaking for the court, in the opinion, said:

> "If the court below had jurisdiction, it necessarily follows that such jurisdiction was exclusive, in so far as the administration of the affairs of the bankrupt is concerned, and the court, in the exercise of its discretion, had the power to stay any proceeding in the state court instituted four months prior to the proceedings in bankruptcy."

The opinion and the record disclose the court below had jurisdiction because the bankruptcy proceedings were, in fact, first instituted (and not instituted four months after the proceedings began in the state court).

Clearly through oversight or some clerical error, the word "within" is omitted from the opinion immediately before the words "four months"—and this part of the opinion should read, and was intended to read: "any proceedings in the state court instituted *within* four months."

C. Bank of Andrew *v.* Gudger, 212 F. 49: That this case in nowise can be properly cited in support of the contention of appellees is made evident by this part of the opinion of the court, written by Judge Woods:

> "Such a case is entirely apart from those cases in which a creditor has gone into the state court and established or acquired by his suit a legal or equitable lien on the property in the hands of the court four months before the filing of the petition in bankruptcy. In such cases the courts have held that the creditor is entitled to enforce his lien in the first court that acquired jurisdiction. The distinction is also evident between this case, and those cases where the state court held the property by its receiver, and there was no question of the subsequent coming into existence of facts giving rise to the right to invoke the exclusive jurisdiction of the federal court."

D. Collett *v.* Adams, 249 U. S. 545 (63 Law Ed. 764): These facts in this opinion are important.

1. On December 22, 1916, a transfer of real estate and personal property was made by the bankrupt to Adams, the respondent.

2. On March 17, 1917 (less than three months after the transfer) a petition in bankruptcy was filed against Cotten, the bankrupt.

3. The opinion holds that under Section 60*b* of the Bankruptcy Act—the four months statute, the bankruptcy court had and could exercise jurisdiction *and expressly refrains from considering what the court's*

decision would be if a suit to avoid the transfer had for four months been defending in the state court on a lien not dissolved by the bankruptcy.

The case of Grafton Gas and Electric Light Company, 253 F. 668, decided in 1918, by the District Court for the Northern District of West Virginia, apparently upholds the contention of appellees and the decision of the trial court in the instant case, although (*a*) the report fails to show the state court proceedings in the Grafton Case were instituted more than four months before bankruptcy proceedings started, and (*b*) Judge Dayton, the trial judge in the Grafton Case, cites with apparent approval, New River Coal and Land Company *v.* Ruffner and Andrews *v.* Gudger, hereinbefore examined, both shown to support our contention here made.

Also, Graham *v.* Davy Pocahontas Coal Company, 238 F. 488, decided in 1916, apparently supports the trial court's decision in the instant case, although Judge Pritchard, speaking for the Circuit Court of Appeals apparently had some misgivings on the question, as is shown by this:

> "The appellee also based its motion in the court below upon the following grounds:
>
> 'That the petition affirmatively shows that more than four months prior to the institution of these proceedings a creditors' suit was instituted in the Circuit Court of McDowell County, West Virginia, requesting that court to assume jurisdiction over and take in its custody the property of the said Davy-Pocahontas Coal Company and administer the same

for the benefit of those entitled, and the petition does not show any impelling reason which would cause this court to supersede the jurisdiction of said state tribunal.

"In view of the present state of the record, we do not deem it necessary to enter into an extended discussion of this point, further than to say that, once a bankruptcy court assumes jurisdiction in a case like the one at bar, it necessarily draws unto itself, in the administration of the persons's or corporation's affairs, jurisdiction and supreme control of the estate of such bankrupt; and this is undoubtedly true in this instance, inasmuch as the alleged acts of bankruptcy occurred within four months prior to the filing of the petition.'"

And then apparently bottoms his decision on the Watts case, which, as we have already seen, is not authority for the decision of the trial court in this case.

This Court, whose voice is final in all cases properly before it, has never unsaid what it said in the Metcalf and Pickens cases, has not recanted, nor disaffirmed its decisions there rendered. So far as we can discover, those who argue it has done so rely solely on the Watts and Bray cases.

The trial courts in the Grafton case comments on the fact there is no statutory provision for the four months interval, and says or indicates there is no authority to sustain those who contend this is the law. It is true the law is not statutory, but it would seem unnecessary to say much law, and many applications of law lack statutory authorization. It is not for us

to concern ourselves as to *why* the law, or *whence* its origin; but rather to content ourselves with a knowledge of *what it is.*

The federal constitution (Article 3, Section 1) expressly says "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time ordain and establish." Which provision, as can not be denied, makes this Court the sole and final interpreter of the law, and its final exponent when there is doubt.

This Court has spoken in language so simple, plain and clear that it is difficult to see how there can be two opinions as to what the law is.

Aside from all earlier expressions of the court of the same import, let us begin our examination of its opinions as to what it holds to be the law governing in the case at bar and in similar cases, with Metcalf *v.* Barker, 187 U. S. 165 (47 Law Ed. 122). In that case the Court, speaking through its Chief Justice, after quoting Section 67 F. of the Bankruptcy Act of 1898, which for this study is of the same effect as subsection C, Section 107, U. S. C. Title Eleven (the present Bankruptcy Act), says:

> "In our opinion the conclusion to be drawn from this language is that it is the lien created by the levy, or a judgment, or an attachment, or otherwise, that is invalidated, and that *where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed null and void on adjudication, but its validity is recognized.* Where it is ob-

> tained within four months the property is discharged therefrom, but not otherwise. A judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens. If this were not so, the date of the acquisition of a lien by attachment or creditor's bill would be entirely immaterial."

In what plainer words, or words freer from ambiguity, could have the court said, as applied to the case we now consider: Since Alley sixteen months before the filing of the petition in bankruptcy by a judgment obtained a lien against the property of the bankrupt, the lien is not only not to be deemed null and void on adjudication, but it is validated and recognized?

The opinion then goes on to decide the district court which sought to stay the court proceeding by injunction is without jurisdiction so to do.

On the same date, December 1, 1902, the Chief Justice in Pickens *v.* Roy, 187 U. S. 177 (47 Law Ed. 128), in affirming the opinion of this Court, as announced by Judge Goff, said: "We are of opinion that the Circuit Court of Appeals was right in its ruling"; and in so doing quoted from, affirmed, and approved the opinion of that court, which said:

> "The bankrupt Act of 1898 does not in the least modify this rule, but with unusual carefulness guards it in all its details, *provided the suit pending in the state court was instituted more than four months before the district court of the United States had adjudicated the bank-*

ruptcy of the party entitled to or interested in the subject matter of the controversy."

In what plainer language, or language freer from doubt or uncertainty, could have the court said, as applied to the case now considered: Since Alley more than four months before the bankruptcy petition was filed, instituted his suit in the state court, the filing of the petition and adjudication thereon did not divest the state court of jurisdiction, but it was *its right and duty to proceed to final decree?*

It is proper here to observe that the Bankruptcy Act now in effect, after all the amendments of 1903, 1910 and subsequently, does not modify but continues carefully to guard the rule referred to, in so far as applicable to the instant case.

Respectfully we submit the law as interpreted, expounded and announced in these two cases is still the law, unrevised, unaltered and without modification.

Then came the Watts case, at the same term, less than six months later, and when the personnel of the court as to seven of its members was unchanged. We have already discussed this case and tried to point out how and wherein some courts since then have obviously misread it, or misapprehended the decision and opinion.

Without attempting to review all cases in this court on this question (conflict of jurisdiction where the state court proceedings were instituted on a valid lien more than four months before the bankruptcy petition was filed) and without examination of the cases decided by the district courts and circuit courts of ap-

peal, let us now see what in at least some cases has been the action of this court since the Watts decision; and we should here say *we have been unable to find a decision which revises or modifies the Metcalf and Pickens decisions.*

In Globe Bank and Trust Company *v.* Martin, 236 U. S. 288 (59 Law. Ed. 583), the court in denying to creditors in suits not supported by liens pre-existing four months, and the suits not brought four months before bankruptcy petition filed, the right to continue jurisdiction in the state court contrary to the bankruptcy court's jurisdiction, refers with clear approval to the Metcalf decision and speaks of it as being now recognized as the opinion of the court.

In Blair *v.* Brailey, 221 F. 1, decided 1915, by the Circuit Court of Appeals of the Fifth Circuit, the court said: "Where a valid judicial lien or levy has been secured or made four months or more prior to the bankruptcy, proceedings to enforce the same may be prosecuted to the end." *And this court denied certiorari,* 238 U. S. 634 (59 Law. Ed. 1499).

In Stellwagen *v.* Glum, 245 U. S. 605 (62 Law. Ed. 507) decided 1918, this court in holding a state court proceeding terminated by bankruptcy proceedings ensuing in less than four months said: "In such cases, the bankruptcy proceedings, taken within four months, displace those in the state court and terminate the jurisdiction of the latter," *and cites in support of its decision the Watts Case.*

In Piedmont Coal Company *v.* Hustead, 294 F. 247, in which was involved the estate of Josiah Thompson,

Bankrupt, decided 1923 by the Circuit Court of Appeals of the Third Circuit, the court held:

> "* * * As the state courts of West Virginia had more than four months prior to the bankruptcy acquired complete jurisdiction and control over the property of the bankrupt thereby attached, they were not divested of their jurisdiction by the bankruptcy of the debtor, nor was their jurisdiction capable of being stayed or arrested by the injunctive process of the district court in which bankruptcy proceedings were pending." Citing the Metcalf and the Pickens cases. "In other words, the plaintiffs in the state suits chose to stand on the security of the liens which the state courts had given them. On the authorities cited we have no doubt they had a right so to do."

The court goes on to say:

> "But the power of a court of bankruptcy to sell, free of liens, property which has come into its control by reason of title and possession derived by the trustee from the bankrupt, does not extend to property whose possession and control has been acquired by another court more than four months before bankruptcy. Here the principle of Metcalf Bros. *v.* Barker and Pickens *v.* Roy enters. And when a state court has thus acquired possession of the property by seizure, its jurisdiction, on authority of Murphy *v.* John Hofman Co. is exclusive of the jurisdiction of all other courts, including courts of bankruptcy, and it may proceed thereon to final disposition. If this were not so, and if the proposition here made, that all

> property of the bankrupt may be sold free of liens, whether in process of enforcement by other courts or not, then the jurisdiction of the court of bankruptcy would be paramount to that of all courts, and there would be neither occasion nor reason for the law announced in Metcalf Bros. *v.* Barker, Pickens *v.* Roy, and Murphy *v.* John Hofman Co. *supra;* Griffin *v.* Lenhart (C. C. A.) 266 Fed. 671; Eyster *v.* Gaff, 91 U. S. 521, 23 L. Ed. 403; Peck *v.* Jenness, 7 How, 612, 12 L. Ed. 841, and Pickens *v.* Dent, 45 C. C. A. 522, 106 Fed. 653. Of course, all that statement means that a court of bankruptcy may sell, free of liens, property which is within its possession and therefore within its jurisdiction, for obviously it can not sell free of liens property which is in the exclusive control of another court."

This last sentence is the complete answer to those who seek to find more in the expression of different courts, in the Watts and other cases, of "the exclusive jurisdiction of the bankruptcy court." In the case at bar the bankruptcy court does not have, and has never had jurisdiction over, or control of, the real estate proceeded against in the creditors' suit in the state court begun more than five months before bankruptcy, and based on valid liens sixteen months old.

It should be here noted this court denied a writ of certiorari in this case. 264 U. S. 582 (68 Law. Ed. 860.)

In Taubel-Scott Kitzmiller Company *v.* Fox, 264 U. S. 426 (68 Law. Ed. 770), this court in holding valid the custody of a state court and its officers, and th

citing with approval the Metcalf and Pickens cases, said:

> "A trustee seeking to have declared void, under subdivision *f* of Sec. 67, a lien obtained through legal proceedings, and to recover possession of property, may be confronted with an adverse claim upon several grounds. It may be asserted that the lien attacked is of a character different from those provided for in that subdivision. Or, although the lien (*i. e.*, that obtained by levy of execution) is clearly one to which subdivision *f* applies, that it is valid by reason of other facts. For the statute does not, as a matter of substantive law, declare void every lien obtained through legal proceedings within four months of the filing of the petition in bankruptcy. The lien may be valid, because the debtor was, in fact, solvent at the time the levy was made. Or, although the debtor was then insolvent, because the property had passed into the hands of a *bona fide* purchaser. *Or, although the debtor was then insolvent and the levy was made within the four months, because inchoate rights by way of lien had been acquired earlier. As the establishment of any one of these facts would bar recovery by the trustee, their assertion presents a judicial question.*"

Without pursuing the inquiry further it is plainly seen this Court continues to hold the law to be as laid down in the Metcalf and Pickens cases, and as affirmed in the proposition at the opening of this argument of the law.

Text Writers and Other Authorities.

Reinforcing our conclusion as to this being law as so determined by the court, we invite the court's attention to what is said by the authorities, all of whom speak since the Watts decision:

1. The editors of U. S. C. A. Title Eleven, Section Eleven, page 70, note 33, say:

> "The general rule has been laid down in numerous cases, including cases in the Federal Supreme Court, that when a suit in a state or a federal court has been, prior to the commencement of bankruptcy proceedings, instituted to enforce a valid lien on the bankrupt's property which lien is unaffected by the subsequent bankruptcy proceedings, and such court, having first obtained jurisdiction over the property subject to the lien, may proceed to final judgment and the enforcement of the lien. The jurisdiction of the bankruptcy court does not supersede the jurisdiction of such court, and the plain title in such suit can not be compelled to seek the enforcement of the lien in the bankruptcy court."

2. Collier on Bankruptcy holds:

> "It is a familiar rule of law, of universal application, essential to the orderly administration of justice, that in order to avoid a conflict between tribunals of co-equal authority, the court first acquiring jurisdiction must be allowed to pursue it to the end to the exclusion of others, and that it will not permit its jurisdiction to be impaired or subverted by a resort to some other tribunal."

Collier on Bankruptcy, Volume 1, page 51 (Thirteenth Edition).

"A suit in a state court to foreclose a mortgage, or to enforce valid liens acquired more than four months before bankruptcy, against specific property, commenced before a petition in bankruptcy is filed against the mortgagor or lienor may be prosecuted in the state court without interference from the court of bankruptcy."

Collier on Bankruptcy, Volume 1, page 803 (Thirteenth Edition).

3. Loveland on Bankruptcy states the law to be:

"Where property is in the actual and lawful possession of a state court or an officer thereof and such court has jurisdiction to administer such property, its possession will not ordinarily be disturbed by process issued by a court of bankruptcy. Thus where the possession of a state court is acquired by a judgment creditor's suit begun more than four months prior to bankruptcy."

Loveland on Bankruptcy (Third Edition), page 115.

4. Remington on Bankruptcy states it this way (2nd Ed. Section 1599):

"To the rule that the state court will retain jurisdiction if it is the first to obtain custody of the property, there are three exceptions: First, where the possession of the state court has itself created a lien by legal proceedings within four months of the bankruptcy, whilst

the debtor was insolvent; second, where a receiver, assignee or trustee appointed by the State Court within four months of the bankruptcy, is in possession; third, where the possession is under state insolvency proceedings that are superseded by the Bankrupt Act."

5. R. C. L. phrases it in this way:

"The provision that liens created within four months shall be dissolved is equivalent to an express provision for the preservation of liens obtained prior to that time."

3 R. C. L., Section 115, page 291, citing Metcalf *v.* Barker.

"The lien acquired by the institution of a creditor's suit within four months before the adjudication in bankruptcy is annulled by section 67 *f*."

3 R. C. L., Section 116, page 292.

6. It is stated in this way by C. J.:

"A court of bankruptcy will not go beyond its own legitimate functions and interfere with the regular course of proceeding in an action pending in another court; but the proceedings therein may be continued, unless the action is such as must be stayed under the provisions of the Bankruptcy Act; and on the other hand no other court can assume to pass upon any matters relating to the bankrupt or his property which legitimately fall within the powers of the bankruptcy court, nor can the pendency of proceedings in a state court limit or affect the right to file a petition in bankruptcy. Accord-

ingly, where some other court has obtained possession of property, its jurisdiction over such property and its right to determine the ownership or disposition thereof is not affected by subsequent proceedings in a court of bankruptcy, unless instituted within four months after such possession was acquired."

7 *C. J.*, Section 28, page 31.

We respectfully submit that the question certified should be answered in the negative.

JOSEPH B. STRATON,
RAYMOND FLESHMAN,
RANDOLPH BIAS,
Appellants (Below),
By RANDOLPH BIAS,
Their Counsel.

Williamson, West Virginia, January 28, 1931.

3n

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CHARLES ELMORE C

Supreme Court of the United States

OCTOBER TERM, 1930

No. [redacted] -137

JOSEPH B. STRATON, RAYMOND FLESHMAN, AND RANDOLPH BIAS, SPECIAL COMMISSIONERS OF THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA, Appellants,

versus

ANDY NEW, JR., TRUSTEE IN BANKRUPTCY OF FALL BRANCH COAL COMPANY, A CORPORATION, BANKRUPT, FIRST NATIONAL BANK OF BLUEFIELD, A BANKING CORPORATION, AND EDWIN MANN, AND ALL OTHERS SIMILARLY SITUATED, ET AL., Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT BLUEFIELD. IN BANKRUPTCY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Supreme Court of the United States

OCTOBER TERM, 1930

No. 920

JOSEPH B. STRATON, RAYMOND FLESHMAN, AND RANDOLPH BIAS, SPECIAL COMMISSIONERS OF THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA, Appellants,

versus

ANDY NEW, JR., TRUSTEE IN BANKRUPTCY OF FALL BRANCH COAL COMPANY, A CORPORATION, BANKRUPT, FIRST NATIONAL BANK OF BLUEFIELD, A BANKING CORPORATION, AND EDWIN MANN, AND ALL OTHERS SIMILARLY SITUATED, ET AL., Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT BLUEFIELD. IN BANKRUPTCY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

TO THE HONORABLES THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners Andy New, Jr., Trustee in Bankruptcy of Fall Branch Coal Company, First National

Bank of Bluefield, and Edwin Mann respectfully submit that in order to answer the queston certified and to do justice it will be absolutely necessary for the court to have the entire record so that it may see on what facts the District Court for the Southern District of West Virginia granted the injunction, *none of which appear in the certificate.* Your petitioners, under the provisions of Rule No. 37, request that this court enter an order directing the Clerk of the United States Circuit Court of Appeals to send up the entire record. In support of this application your petitioners here state that the following are uncontroverted facts appearing in the record:

The Fall Branch Coal Company, owning coal lands, leases and improvements lying in the States of Kentucky and West Virginia, separated only by Tug River, which constitutes the States' boundaries, was on the 4th day of August, 1928, adjudicated a bankrupt upon a voluntary petition filed on that date. On the 21st day of August, 1928, various creditors and their counsel appeared at the first meeting of the creditors, among them being appellant Randolph Bias, who appeared for himself and the other appellants, and represented prior, lien and unsecured creditors. Included in the claims proven by appellants are a number of judgments which had been obtained against the bankrupt and proven in a judgment creditors' suit instituted in the Circuit Court of Mingo County, West Virginia, in February, 1928, in which suit a decree of sale was entered on the 17th day of July, 1928. Appellants, Messrs. Bias, Straton and Fleshman (the latter associated in the practice of law with Mr. Bias), were counsel prosecuting the suit and were

appointed Special Commissioners to sell the West Virginia property. The claims proven and voted by Mr. Bias at the first meeting of the creditors comprise all the liens proven in the chancery suit, with the exception of the first and second liens, which are held by appellees The First National Bank of Bluefield and Edwin Mann, who also proved their claims in the bankruptcy court; hence *all* creditors who proved claims in the chancery suit appeared and proved their claims in the bankruptcy proceedings. Appellant Bias, on behalf of the firm of Staten and Keesee, attorneys of Pikeville, Kentucky, who were unable to be present at the first meeting, also proved the claims of all the sixteen lessors, for rent due under the coal land leases lying in Kentucky. He also filed a number of labor claims and asserted priority for them; and proved other claims that had been reduced to judgment but which had no priority. (R. p. 8-9-10.)

The total amount owing on the first and second liens, being deeds of trust held by appellees, The First National Bank of Bluefield and Edwin Mann, was, on the 21st day of August, 1928, $56,580.69. The total of the junior liens set up in the chancery suit is $6,678.78, of which amount $3,144.61 represents judgments taken *within* four months of the adjudication in bankruptcy, leaving only $3,534.17 in liens which were not avoided by the adjudication in bankruptcy and all of which are junior to the first and second liens amounting to $56,580.69. Appellant Bias represented in the chancery suit only the third lien ($228.60); and the twelfth lien ($584.22), which latter is included in the item of $3,144.61 mentioned above and should be avoided by the bankruptcy proceedings but will not be if the State Court retains jurisdiction.

On the morning of the first meeting Mr. Bias and Mr. New came to Bluefield from Williamson. There was a contest over the election of the Trustee and Mr. Bias nominated and elected Mr. New. To elect their nominee, appellants, thru Mr. Bias, proved the judgments, for which they now claim priority to defeat the jurisdiction of the bankruptcy court, as "Unsecured—No priority." (R. p. 8.) Mr. Bias took the lead in the deliberations with respect to the amount of the Trustee's bond, which was fixed, with his approval, at $30,000.00. He actively participated in the discussion as to the amount of insurance the Trustee should carry on all of the property situate in both States. This was fixed, with his approval, at $50,000.-00. With his knowledge and consent the Trustee on that day insured the property in Kentucky and West Virginia for $50,000.00. (R. p. 3 and 25.)

At this meeting, the matter of having the Trustee take active charge of the property in West Virginia and Kentucky and protect the same by and through a custodian, or guard, was fully discussed. Mr. Bias actively participated therein and, with his approval, his nominee and Trustee was authorized to employ a custodian to take actual possession of all the property, and he did so. And ever since that time the property has been in actual possession of the Trustee through his custodian, with the approval of appellants. (R. p. 3 and 25.) Appellants never had possession of the property actually or constructively. The property was in the actual possession of the Corporation up to the time of the appointment of the Trustee in Bankruptcy on August 21st, 1928, when actual possession passed to the Trustee by and through his cus-

todian. The Commissioners were appointed under the provisions of Section 1, Chapter 132, of the Code of West Virginia, which limits their authority to that of making sale of the property.

Mr. Bias took a leading part in the selection and appointment of the appraisers. (R. p. 3.) With his approval the appraisers entered upon the performance of their duties, and made a detailed inventory and appraisal of the property in West Virginia and Kentucky. In fact it was he who instructed them in the performance of their duties. (R. p. 10.)

At this meeting Mr. Bias moved the Referee to enter an order authorizing the Trustee to operate the property of the bankrupt, which motion the Referee took under consideration, and later refused to grant. (R. p. 3 and 31.)

Mr. Bias was at least willing to accept the appointment as counsel for the Trustee. He consulted the Referee with respect to appointing him counsel for the Trustee. The Referee advised him that because of his representation of creditors it would be necessary to obtain authority from the Judge to make this appointment. (R. p. 69-72-73-74.) Mr. Bias did not wish the Referee to do this and he then suggested the name of Mr. E. A. Hansbarger as counsel for the Trustee, whom the Referee at that time appointed. Later, when this controversy arose, Arthur F. Kingdon was joined with Mr. Hansbarger.

Pending consideration of the motion to authorize the operation of the plant and the completion of the

appraisal, no further order was entered. But on the 12th day of September the Referee entered an order declining to authorize the Trustee to operate the plant and directing him to advertise the property for sale, of which order appellant Bias had notice. (R. p. 69 and 5.) The execution of this order was delayed at the request of The First National Bank of Bluefield and Mr. Mann, who represented to the Referee that they had a prospective purchaser for all of the property.

Subsequent to the 21st day of August, nothing was heard from Messrs. Bias, Stration or Fleshman until the 6th day of October, 1928, when the Trustee, Referee and the officers of The First National Bank of Bluefield and Edwin Mann learned that the respondents had advertised the property of the bankrupt situate in West Virginia, under a decree of the Circuit Court of Mingo County, West Virginia, to be sold on October 15th. (R. p. 4-71-68-64-65.) Neither the Referee, the Trustee whom Mr. Bias elected, nor his counsel, was advised of the move to sell the property under the Circuit Court decree. (R. p. 69-65-65-4.) They first learned of the sale by seeing an advertisement in the Williamson paper on or about the 6th day of October, 1928. Appellants reside in Williamson. Mr. New resides within six miles of Williamson. Mr. Hansbarger resides in Williamson. He was absent from the 6th day of September to the 26th day of September, 1928, which Mr. Bias knew. Being unable to persuade appellants to abandon their proposed sale, counsel for the Trustee advised appellants that if they would agree to postpone their sale for a short time he would immediately take up with the Referee the question of having the Trustee in Bankruptcy advertise the

property on the Kentucky side, holding both sales at one time if practicable, but appellants declined to accede to this request. (R. p. 66.) (Appellants deny this, but on a review of the facts we take it the finding would be in favor of the appellees.)

Following this refusal the Trustee, The First National Bank of Bluefield, and Edwin Mann filed their petition with the District Court, setting up the foregoing facts and averring that the District Court had lawfully acquired complete and exclusive jurisdiction to administer the property of the bankrupt and that for this reason as well as because of the great injury which would accrue to the appellees and all other creditors, an injunction should be granted enjoining and restraining appellants Bias, Straton and Fleshman from proceeding to sell the property on the West Virginia side of the river, and for such other relief as should be just and lawful. A temporary injunction was granted on the 15th day of October, and later an answer was filed and a motion to dissolve made. Later the matter was argued by counsel and, by agreement, the whole matter was submitted "as if upon a final hearing, the affidavits being considered as depositions and the exhibits as if introduced with depositions." (R. p. 23.) On the 15th day of December, 1928, the injunction was perpetuated, from which decree appellants appealed.

The material uncontroverted facts with respect to the great damage which *all creditors* will suffer by a divided sale, and with respect to the equities of the case generally are as follows:

The property of the bankrupt situate in West Vir-

ginia consists of dwellings, store and office building, garage, stable, store stock and fixtures, tool and supply house, live stock and stable equipment and 5.4 acres of land in fee, on which there is situate the coal tipple, picking tables, etc., various other mine buildings, one end of an aerial tramway, extending from the tipple in West Virginia to the mine openings across the river in Kentucky, and other miscellaneous improvements, including the railroad siding. All of the foregoing is appraised at $45,948.00, which is $10,632.00 less than the amount of the first and second liens held by appellees, The First National Bank and Mr. Mann, respectively. The property in Kentucky, immediately across the river from the property in West Virginia, consists of 8.83 acres of land in fee, numerous leaseholds, three dwellings, part of the aerial tramway and equipment, electric hoists, track incline, etc., motor generators, electric locomotives, mine buildings, powder house and numerous other items of equipment listed on pages 3, 4 and 5 of the appraisal. The total appraised value of the property in both States is $81,953.00 and the total indebtedness is $130,424.16. Of the total appraised value of $81,953.00, $36,005.00 represents the improvements on the Kentucky side, situate on the leased lands which contain *all* the coal.

It is averred in the petition and affidavits and *not denied* that if the property in West Virginia is sold apart from the property in Kentucky the creditors will suffer great injury, all the coal lands being in Kentucky, the necessary mining equipment being divided between the two States, while the only available railroad is situate on the West Virginia side; and that the coal mined on the leased land in Kentucky can only be

brought to a railroad by crossing the lands of the bankrupt in West Virginia. Willis Staten, of the firm of Staten and Keesee, for whom appellant Bias appeared at the first meeting, has filed an affidavit (which has not been challenged) (R. p. 67) from which it appears that he represents all the lessors and that he permitted Randolph Bias and Raymond Fleshman to be co-representatives with him, inasmuch as he could not be present, so that they might represent his clients at the first meeting of the creditors. He repudiates the conduct of appellants. He says that if the property is held intact "as a coal operation, it has a material value as an asset," but that if any portion of the holdings is sold separately, his clients, "being all of the lessors," will file suits to cancel all of the leases, because the property will, if sold separately, become worthless. Quoting: "If the West Virginia property held in connection with this mining operation is sold separate from the other, its only value would be the surface value * * * *. It would greatly impair the assets * * * * and result in injury to all the creditors. * * * * If the royalties are not paid and the value of the property is destroyed by a severance of the property, and the sale of some before the sale of all together, then suits will be filed in due course for the purpose of cancellation of leases, because the lessors and their counsel believe that the property is or will be thereby destroyed for the purposes under the leases." (R. p. 67.)

The following portion of Section V of the petition (R. p. 5) is undenied: "* * * * That a separate sale of the West Virginia property will result in greatly depreciating the value of the property in Kentucky,

which it is the duty of this court to administer, and it will likewise result in greatly depreciating the value of the West Virginia property, with no corresponding benefit to anyone, unless it be to the Special Commissioners" (by way of commissions on the sale of the West Virginia property).

It also appears that the laborers, and the unsecured creditors (represented by appellants) who have no judgment may be especially injured if the bankruptcy court does not retain jurisdiction, because, having no judgment or mechanics liens, they can not even participate in the proceeds derived from a sale of the property in the judgment lien creditors' suit in West Virginia, whereas in bankruptcy they can participate and claim priority of payment out of certain property.

It was a month after appellants had appeared and sought authority from the bankruptcy court to operate the mine, which was refused, that they attempted to withdraw and go back to the State court. They admit that it was because of an *adverse* decision on their motion that they wanted to withdraw. We quote from their answer (R. p. 32): "Being unable to induce the Referee to delay sale by the Trustee and permit the Trustee to temporarily operate the plant as desired by the Trustee himself and most, if not all, of the creditors represented by respondent Bias, including practically all the laborers and working men, to await a better market for the sale of the leases and mining plant your respondents were left to the alternative of abandoning their creditors' suit and omitting to carry out the decree of sale, or of continuing to completion that suit. * * * *"

The bankruptcy court, at the instance of appellants, incurred very considerable expense in having the detailed inventory and appraisal made, in employing a custodian for the property and in insuring the property in the sum of $50,000.00.

It is the contention of appellees that this case is readily distinguished from the general run of cases involving "conflicts of jurisdiction," and that it should be decided upon its own facts without regard to what may be the law, generally, with respect to conflicts of jurisdiction in cases of this kind, as to which we concede there is an apparent conflict of authority. It is our contention that it is immaterial what the rights of appellants might have been if they had not come before the bankruptcy court and voluntarily submitted to its jurisdiction. That they did submit to its jurisdiction, and in fact invoke its jurisdiction in matters relating to the administering of the estate, we think is established beyond peradventure by the uncontroverted facts. Recognition of their nominee's title to the property, his taking actual possession of the property on their motion, their petitioning the court to direct him to operate the property and the willingness of appellant Bias to accept appointment as counsel for the Trustee, seem to us conclusive on this question. But whatever may have been their intentions, in view of the lawfully acquired possession of the Trustee, we think this case resolves itself into one of law only and that the law applicable is contained in the opinion of this court in the case of Harkin vs. Brundage, 276 U. S. 36, 48 S. C. R. 268.

However, apart from the legal effect of actual possession of the property by the Trustee in Bank-

ruptcy, it is our position that the acts of appellants establish, as a matter of law, unequivocal recognition of the jurisdiction of the bankruptcy court. We do not see how appellants could have induced the court to take actual possession of the property and moved the court to order the Trustee to operate the property without thereby recognizing its complete jurisdiction over the property Surely they can not repudiate the jurisdiction following an unfavorable decision. We know of no law which would accord to them that right.

When we add to the facts mentioned in the foregoing paragraphs the equities of the situation, we respectfully submit that a strong case is made calling for the exercise by this court of the power to order up the entire record and decide the whole matter in controversy as if upon appeal.

Your petitioners submit with this motion transcripts of the records made in the lower courts.

ANDY NEW, JR., TRUSTEE,

THE FIRST NATIONAL BANK OF BLUEFIELD, and EDWIN MANN,

By ARTHUR F. KINGDON,
Of Counsel.

FILE COPY

FEB 26 1931
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1930

No. 137

JOSEPH B. STRATON, RAYMOND FLESHMAN, AND RANDOLPH BIAS, SPECIAL COMMISSIONERS OF THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA,

Appellants,

versus

ANDY NEW, JR., TRUSTEE IN BANKRUPTCY OF FALL BRANCH COAL COMPANY, A CORPORATION, BANKRUPT, FIRST NATIONAL BANK OF BLUEFIELD, A BANKING CORPORATION, AND EDWIN MANN, AND ALL OTHERS SIMILARLY SITUATED, ET AL.,

Appellees.

BRIEF OF COUNSEL FOR APPELLEES

E. A. HANSBARGER,
ARTHUR F. KINGDON,
Counsel for Appellees.

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Appellees.

BRIEF OF COUNSEL FOR APPELLEES

ADDITIONAL STATEMENT OF FACTS

The State proceeding involved in this case is a judgment creditors suit brought under the authority of Section 7, Chapter 139, of the Code of West Virginia. The text is set out in full in the Appendix.

By reference to the statute it will be seen that this is not a suit to enforce only plaintiff's judgment, but a suit instituted on behalf of the plaintiff and all other lienholders. It is a general creditors suit. It is the only form of creditors suit authorized by the

laws of West Virginia except suits to settle estates of deceased persons, which suits may be brought by creditors who have not reduced their claims to judgment. Judgments may be obtained after the bill is filed, and even after the Commissioner in Chancery's report has been filed, and proven in this suit. No lien is obtained by the filing of the bill. Each judgment is a separate lien, taking priority as of the date of rendition. The bill, pursuant to the statute, alleges exhaustion of the personal property and prays ascertainment and subjection of all the real estate of the corporation. It is a winding up proceeding in which disposition and distribution of all the bankrupt's property is to be made pursuant to the State law, which law is very materially at variance with the Acts of Congress governing disposition of the property of bankrupts.

Unfortunately appellants have gone outside the facts set forth in the certificate and averred that the State Court had "placed them in custody of the real estate" (page 5), and (page 13) "this real estate was in custodia legis, the actual custody of appellants," etc., and again (page 6) they aver that they had assumed the duties of and executed the Commissioners' bond and had the real estate in custody when the judgment debtor filed its voluntary petition in bankruptcy.

These erroneous assertions compel us to go beyond the certificate and into the original record to show the facts, which are as follows:—

On July 17th, 1928, eighteen days before the Corporation was adjudicated a bankrupt, a decree was entered by the Circuit Court of Mingo County

adjudging the amounts of the liens and their priorities and directing the Corporation to pay the same within thirty days from the rising of the Court. In case of default the decree provided that the property be sold and appellants were, in that event, to sell the property. But before taking any steps to sell the property they were, pursuant to the terms of the statute, required to qualify by giving bond. They did not give bond until September 20th, on which date the Trustee in Bankruptcy had had possession, with a custodian in charge on the premises, for exactly thirty days. Prior to the time the Trustee took charge the property was in the actual custody and control of the corporate officers and agents. It will be observed that the earliest date upon which the appellants could have qualified is August 17th, which is thirteen days after the Corporation was adjudged a bankrupt.

ARGUMENT

ANY PROCEEDING PENDING IN A STATE OR FEDERAL COURT WHICH HAS SOLELY, OR PRIMARILY, AS ITS OBJECTIVE A GENERAL DISPOSITION AND DISTRIBUTION OF THE PROPERTY OF A PERSON OR CORPORATION WHO BECOMES A BANKRUPT, IS SUPERSEDED BY THE ADJUDICATIN OF BANKRUPTCY AND THE EXCLUSIVE RIGHT TO ADMINISTER THE ESTATE, IN ACCORD WITH THE ACTS OF CONGRESS RELATING TO BANKRUPTCY, PASSES TO THE FEDERAL COURTS SITTING IN BANKRUPTCY.

Constitution, Article 1, Sec. 8. Bankruptcy Act, Sec. 2, first paragraph. Bankruptcy Act, Sec. 2, sub-div. 15, and last paragraph Sec. 2; and cases cited throughout this brief.

Because appellants in the court below rested their case upon Metcalf v. Barker, 187 U. S. 165, 47 L. Ed. 122, and Pickens v. Dent Roy, 187 U. S. 177, 47 L. Ed. 128, and will undoubtedly do so in this court, we believe it advisable to immediately distinguish the facts of those cases from the facts of this case.

Metcalf vs. Barker differs from the case at bar in the following particulars:—

1. It was not a general creditors bill. It was a suit by a single plaintiff to set aside an alleged fraudulent transfer of real estate. Neither title nor posession were in the bankrupt. Both were with the fraudulent transferee.

2. In a suit of such character a lien is obtained by the filing of the bill.

3. The bankruptcy act was passed after the institution of the suit; and when it was enacted there was **no jurisdiction** given to entertain suits to set aside fraudulent conveyances; that jurisdiction was given later; it exists now and is only **concurrent**, not exclusive, (Sec. 70-e), whereas the jurisdiction to **adminster** the property of bankrupts is **exclusive.**

4. Before the passage of the bankruptcy act the debtors had, in another suit in the same court, procured the appointment of Receivers who had been in charge of all of their property not fraudulently transferred for more than two and a half years

before the adjudication of bankruptcy and more than eighteen months before the passage of the act.

5. The transfers were finally held to be fraudulent only as to the plaintiff; "as to all other persons they were (until impeached in proper action) valid." Thus, subject only to the lien of Metcalf Brothers, title to and possession of the property **remained** with the transferees.

In the case of Tennessee Marble Co. (No. 827) in the District Court of the United States, at Knoxville, Judge (the late Justice) Sanford had this to say with respect to the distinction between the proceedings in Metcalf v. Barker and a general creditors bill:—

> "While, as was held by the Supreme Court of the United States in Metcalf Bros. v. Barker, 187 U. S. 165, 174, the validity of proceedings in other courts for the enforcement of specific liens obtained through legal proceedings more than four months prior to the filing of the petition in bankruptcy, is recognized by Section 67-f of the Bankruptcy Act and the jurisdiction of such other courts in such proceedings is not superseded, and while such suits may clearly be proceeded with to their termination without impairing the jurisdiction of the bankruptcy court in the general administration of the bankrupt's estate, obviously this is not the case when the proceedings in such other court have for their object the entire winding up of the bankrupt's affairs."
>
> "Manifestly such court and the bankruptcy court cannot both proceed with the general administration; one or the other must have priority. Therefore, as the bankruptcy court is the only court which can fully administer the estate

in accordance with the bankruptcy act, no other court having authority, for example, to avoid preferences denounced by that act, and the creditors having in no other court the right to participate in the administration of the estate through creditors' meetings as provided by the bankruptcy act, it follows that if the provisions of the bankruptcy act are to be enforced, the bankruptcy court must of necessity upon the adjudication in bankruptcy, acquire an exclusive jurisdiction for the administration of the estate which supersedes the general jurisdiction of any other court in general proceedings that would otherwise inevitably conflict with the bankruptcy proceedings and bring about a winding up of the bankrupt's affairs in a manner different from that provided by the bankruptcy act."

Pickens vs. Dent Roy, a case arising in West Virginia, was also merely a suit to set aside a fraudulent conveyance. In West Virginia **a lien is acquired by the filing of such a bill.** Gilbert vs. Peppers, 65 W. Va. 355, 64 S. E. 361; Wildasen vs. Long, 74 W. Va. 583, 82 S. E. 205. The bill was filed nine years before the passage of the Bankruptcy act. A receiver had been appointed. The trustee in bankruptcy filed a petition in the suit asking the Circuit Court to proceed to final adjudication and enforcement of plaintiff's lien; the bankrupt filed in the District Court a bill for an injunction; his right to maintain said bill after being adjudged a bankrupt was denied. The State court at that time had **exclusive jurisdiction** of suits to set aside fraudulent conveyances. And, as heretofore stated, even now its jurisdiction in that respect is concurrent with that of the Bankruptcy Court. Both title and posses-

sion of the property were vested in the transferee.

In neither Metcalf vs. Barker nor Pickens vs. Dent Roy did the enforcement of the liens result in a distribution contrary to the Bankruptcy Act.

In the West Virginia case of Graham Manufacturing Co. v. Davy Pocahontas Coal Co. (238 Fed. 488) the Circuit Court of Appeals for the Fourth Circuit held that the jurisdiction of the Court of Bankruptcy was paramount and exclusive, notwithstanding the fact that an identical judgment creditors suit had been pending for more than four months, where the appointment of a receiver on the ground of insolvency occurred within four months of the filing of the petition in bankruptcy. That was held to be an act of bankruptcy of which the creditors could take advantage, and that when an adjudication followed, the jurisdiction of the State Court ended. Can it alter the case because an adjudication of bankruptcy occurred in the instant case through the voluntary act of the Corporation? On the authority of the above case and of Re Watts and Sachs, (23 S. C. R. 717) we submit that it does not. In the case of Re Watts and Sachs this court said:—

> "The operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations applying to be wound up under State statutes. The bankruptcy law is paramount, and the jurisdiction of Federal courts in bankruptcy, **when properly invoked**, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive."

Is not the jurisdiction of a court of bankruptcy as "properly invoked" by the filing of a voluntary

petition in bankruptcy by the corporation as by the filing of an involuntary petition by creditors? An answer in the affirmative seems to us the only possible answer. If the insolvent corporation **may not defeat** the operation of the bankruptcy law by **going** into the **State court** to be wound up, is it also to be **prevented** from going into the **Bankruptcy Court** to be wound up? In the Watts case it was the corporation that went into the State court and the creditors who went into the bankruptcy court and compelled the relinquishment by the State court so that they might have the benefits of the bankruptcy law. In this case it is certain creditors who seek to uphold the jurisdiction of the State court and to defeat the jurisdiction of the court of bankruptcy, thereby securing for themselves illegal preferences and also displacing the priority claims of workmen for wages. It was to avoid this result that the Corporation filed a voluntary petition.

Had the Corporation not filed a voluntary petition creditors could unquestionably have obtained an adjudication in involuntary proceedings based upon the many judgments rendered within four months and failure to pay the same within thirty days, as well as upon the preferences effected by the State court decree of July 17th ordering payment of said judgments in date order. Again it will be noted that appellants claim for themselves the status of Receivers, by virtue of the decree of July 17th, 1928. If their contention is correct, then this was a further act of bankruptcy of which the creditors could have taken advantage. Would it not be an anomolous thing if, having granted an adjudication upon these

grounds, the bankruptcy court should then be left powerless to prevent the consummation of the very preferences which were the basis of the adjudication? We are unable to see how the status is altered because the adjudication was made on a voluntary petition. Surely, since an adjudication of bankruptcy had already occurred upon a voluntary petition, to have instituted involuntary proceedings would have been futile and vexatious. In fact, we believe a decree of former adjudication would have been sustained. We submit that it was the right, and in fact the duty, of the corporation to protect its creditors against illegal preferences and to extend to its workmen and other employees the priority given to them by the Acts of Congress, and that it would be unreasonable to hold that the creditors were deprived of their rights because the corporation made it unnecessary, if not impossible, for them to obtain an adjudication upon an involuntary petition.

In the carefully considered opinion written by Judge Dayton in Re Grafton G. & E. Co., 253 Fed. 668, the District Judge, referring to the court's opinion in the case of Graham Mfg. Co. v. Davy Pocahontas Coal Co., says:

> "In the Graham case it is held, if I interpret aright, immaterial how long the State court suit has been pending, but in the exceptional case where one is sought to be forced into involuntary bankruptcy alone on the ground of the appointment of a receiver such appointment must have been within four months, because the act requires some act of bankruptcy to have been committed within four months before involuntary proceedings can be maintained at all No

such condition can ever arise in a voluntary proceeding; therefore, in such cases, I am constrained to believe the "four months period" has no relevancy whatever."

We find absolutely nothing in the statute, **express or implied**, which says that when bankruptcy occurs a State court proceeding which has for its object the general enforcement of liens and distribution of the bankrupt's property in accordance with State laws, may continue because commenced more than four months before the adjudication of bankruptcy. Clearly, the statute, Section 67-c, recognizes the **validity** of liens obtained by **pending** legal proceedings commenced within four months. And Sec. 67-f makes **judgments** not obtained within four months **valid liens.** But the existence of an ordinary judgment at law, obtained in a proceeding previously terminated, surely could not deprive the court of jurisdiction; otherwise the mere rendition and recordation of any ordinary money judgment for a period of four months would prevent the court of bankruptcy from taking jurisdiction of the bankrupt's property. While, as heretofore stated, no lien was obtained by the institution of the suit involved in this case, it may be worth while to note that although Sec. 67-c, by implication, preserves liens obtained by legal proceedings pending at the time of the adjudication, it does not **say or imply** that the court of bankruptcy may not **administer** the property of the bankrupt. By implication it is said that such liens, if **not** obtained within four months, are **not** voided. There is nothing in the statute, as we read it, which implies that a court of bankruptcy may not

restrain **administration** by a state court even when a lien has been obtained more than four months before the adjudication of bankruptcy **by the filing of the bill or the levy of an attachment** in a proceeding then pending; and surely no such implied meaning should be given to the statute if it results in permitting the State court to administer generally the property of the bankrupt pursuant to State laws which are plainly contrary to the express terms as well as the spirit of the Acts of Congress. A creditor holding a lien not avoided by bankruptcy would have the "reward of his diligence" through recognition of his lien by the court of bankruptcy. In a case where a plaintiff had attached property to enforce a right of action and the enforcement of the lien did not result in administering the property contrary to the Acts of Congress, the State court, with the permission of the court of bankruptcy, would no doubt be allowed to sell the property. Such a situation would be a case calling for exercise of the inherent discretionary power of the Bankruptcy Court, which power, as a court of equity, it unquestionably has. If the lien were inchoate and perfection depended upon the successful prosecution of the plaintiff's action, of course, the plaintiff, upon perfecting his lien, would be accorded the benefit of the same in any event. Appellants now concede (page 22) that there is no statutory provision covering "the four months interval". Nevertheless, they contend that by the decisions of this court in Metcalf v. Barker and Pickens v. Dent Roy, this court established a time limit within which adjudication of bankruptcy must have occurred in order to defeat the State court's jurisdiction in the

case now before the court. We think an analysis of these cases shows that they do not establish any time limit within which proceedings in bankruptcy must be instituted in order to prevent a State court from administering the estate of a bankrupt in a general creditors suit, pursuant to the State laws, which are in plain contravention to the provisions of the Acts of Congress relating to bankruptcy. All that those decisions amount to, as we see matters, is this: On the facts of those two cases the court held that the liens which had been acquired by the pending proceedings were not invalidated by the subsequent adjudication of bankruptcy, but, as heretofore stated, those were suits to set aside fraudulent conveyances, of which the Bankruptcy Court had, at that time, no jurisdiction at all, and of which it has today only concurrent and not exclusive jurisdiction. Furthermore the enforcement of the State court's decrees in those cases did not result in a distribution of the property of the bankrupts contrary to the terms of the Acts of Congress.

In an exhaustive opinion in the matter of Tennessee Marble Company, (Knoxville), Case No. 827, the late Justice Sanford, (then District Judge), in sustaining an injunction against the further prosecution of a creditors suit said:—

> "It is true that in some of the decisions in which insolvent proceedings in the State courts have been held to be terminated by an adjudication in bankruptcy, the decision has been based upon the fact that the receiver has been appointed in such insolvency proceedings within four

months preceding the filing of the bankruptcy petition; and in others upon the ground that the appointment of a receiver in such insolvency proceedings was a specific ground upon which the subsequent adjudication in bankruptcy was made (1 Remington on Bankruptcy, ss. 1602, 1603, P. 996; Loveland on Bankruptcy (3rd ed.) ss. 23, p. 117; Collier on Bankruptcy (7th ed.) ss. 23b, p. 418; and cases cited). Most of these decisions were rendered, however, before that in the Watts case, and any implied limitation of the general rule to such specific cases is, I think, inconsistent with the broad principles of the paramount jurisdiction of the bankruptcy court stated in the opinion in that case. **** I rest my opinion in this case upon the doctrine stated by the Supreme Court in the Watts case, that the bankruptcy law is paramount, and the jurisdiction of the Federal Courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive,' and the broad principle that such paramount and exclusive jurisdiction of the bankruptcy court **necessarily terminates the jurisdiction of any other court in prior proceedings of like character for winding up the estate of the bankrupt, which are necessarily inconsistent with the administration of the estate by the bankruptcy court and incompatible with the discharge of the duties of the bankruptcy court under the Bankruptcy Act."**

Justice Sanford then quotes from Re. Hecox (C. C. A.) 164 Fed. 823, 825, as follows:

"The scheme as well as the policy of the bankrupt act is that the collecting, marshalling, administration, and distribution of the bankrupt's estate shall reside exclusively in the court of bankruptcy."

Justice Sanford next quotes from Re. Smith, 92 Fed. 135, as follows:

"The bankruptcy act contemplates no divided jurisdiction. It would cease to possess any vital force or efficiency if the State court, proceeding under our state insolvent laws, may hold possession of the bankrupt's estate, collect in the debts, allow claims, and make final distribution among those entitled to participate therein, leaving to the court nothing but the adjudication of bankruptcy and the discharge of the bankrupt. Such a construction is inadmissible because it would render inoperative numerous express provisions of the bankruptcy act. **** The Bankruptcy act is the supreme law of the land, enacted in pursuance of an express grant of constitutional authority; and, in so far as any state law is in conflict with it, such law is suspended and remains inoperative until the federal enactment is repealed. All matters embraced in the bankruptcy act must be controlled and governed by its provisions. Among these are the right and duty of the bankruptcy court to have insolvent estates settled in and by it, under and in accordance with the provisions of the bankruptcy act; **** to have liens and preferences governed by it. **** In my opinion, the operation of the State law is suspended, and the State courts are without any jurisdiction or authority to administer the estates of bankrupts or insolvents ****. The jurisdiction of the bankruptcy court is supreme; it is exclusive and the acts of the State courts are unauthorized and void, because jurisdiction over the person and estate of the bankrupt is drawn to, and vested exclusively in, this court by the adjudication of bankruptcy."

Justice Sanford also quoted from Re. Whipple, 6 Biss. 516, Fed. Case No. 17, 512, in which it was held:

> "Proceedings in bankruptcy superseded a creditors' bill in a State court, and the receiver appointed by the State court could be compelled to deliver the property to the assignee in bankruptcy, subject to all rights or priorities which the creditors whom he represented had obtained by their diligence."

In that case the court said:

> "It seems utterly impossible to carry on the two administrations together; the estate should be administered in one court, and I think the bankrupt court the proper one. **** And I think that the better authority and the more reasonable doctrine is that the proceedings in bankruptcy supersede all other proceedings for the administration of the assets of the debtor, subject only to priorities which are obtained by any creditor by the use of diligence, which are to be respected and which should be paid in the order of priority, according to whatever rights have been obtained."

Justice Sanford cites other Federal decisions; also decisions of State Supreme Courts as follows:

> "In the case of Mauran v. Carpet Lining Co., 6 Am. Bankr. Rep. 737, 23 R. I. 324, 50 Atl. 331, the Supreme Court of Rhode Island said:
>
> "The plenary and paramount power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States," says Hall, J., in Re Deposit Savings Inst., Fed. Cas., No. 12,221, p. 141, is given in express terms by the Constitution of the United States. It is therefore very clear that when Congress has

exercised the power thus conferred their action must necessarily control or limit the exercise of the power of the States over the same subject matter; and that whenever any State legislation, or any action of the State courts, comes **practically** into actual conflict with the proper execution of the laws of Congress, constitutionally passed under such grant of power, State legislation and the jurisdiction and action of the State courts must yield to the paramount authority of the national government.'

"The object and intent of the national bankruptcy law is to place the administration of the affairs of insolvent persons and corporations exclusively under the jurisdiction of the Federal Courts sitting as courts of bankruptcy ****'."

He then quoted from the case of Herron Co. v. Superior Ct., 8 Am. Bankr. Rep. 493, 136 Cal. 279, Pac. 814, 89 Am. St. Rep. 124, in which the Supreme Court of California said:

"The provision in the Constitution of the United States conferring upon Congress the power to establish uniform laws on the subject of bankruptcies throughout the United States, of necessity makes any act of Congress passed upon the subject the supreme law of the land, and it was at a very early day determined that the effect of such action of Congress is to suspend and supersede the operation of any State law of insolvency whenever there is a conflict between the two. There can be no concurrent jurisdiction in the two sovereignties over the same subject, and, as the people of the several States have yielded to the United States the power to enact laws upon this subject, it follows that when the United States has enacted a law the power of the State to enforce its own law upon that subject, whether it be similar or dif-

ferent, must yield to what is the supreme law of the land."

From Loveland on Bankruptcy (3rd ed.) Sec. 23, P. 116, Justice Sanford cites the following:

"But where the possession of the state court would have the effect of defeating the operation of the bankruptcy law, the courts of bankruptcy may seize such property for the purpose of administering it in accordance with that law. The reason for this is that the bankruptcy law places the administration of the affairs of insolvents exclusively under the jurisdiction of the bankruptcy courts. In this respect the state courts have not concurrent jurisdiction with the courts of bankruptcy, and the general rule of comity has no application. The bankruptcy law is paramount and should not be defeated by proceedings in a state court."

And from 1 Remington on Bankruptcy, Sec. 1625, P. 988, Justice Sanford cites the following:—

"The third exception to the rule that the state court retains jurisdiction if first in possession of the res, is where the property at the time of the bankruptcy is in the custody of a State court under State insolvency or State Bankruptcy proceedings, or proceedings amounting to such, in which event proceedings are suspended by the Federal bankruptcy proceedings."

In closing his opinion, Justice Sanford said:—

"I have reached the conclusions stated in this opinion after most careful consideration, with a deep sense of the importance of the question involved."

In the case of Bailey vs. Blackmon, 14 Fed. (2nd) 16 (CCA 4th) the court, speaking through

Judge Waddill, said that a court of bankruptcy,

> "May stay proceedings in a State court begun prior to proceedings in a bankruptcy and, indeed, stay the taking of any steps embarrassing to the equitable distribution of the estate of the bankrupt."

In the case of Bank of Dillon vs. Murchison, 213 Fed. 147, (CCA 4th) the court said:—

> "The bankrupt law being supreme and the District Judge of the United States being constituted the especial judicial expounder of it, the responsibility is primarily upon him to determine, in each case, whether its administration shall be shared with another. His discretion in the premises will be rarely reviewed unless abuse of it is clearly shown." Citing New River Co. vs. Ruffner, 165 Fed. 881; Va. I. C. & C. Co. vs. Olcott, 197 Fed. 730.

In the same case the court said:—

> "The bankrupt law is supreme and its practical and plenary administration is more and more demonstrating the fact that it must, to a very great extent, be exclusive."

The soundness of this pronouncement had apparently become even more evident by the time the court decided the case of Bailey vs. Blackmon, supra, wherein there was pronounced the broader, and in our opinion, salutary doctrine that,

> "While the rules with respect to comity between courts shall be respected where the same can be done without violence to the bankrupt and its creditors, nevertheless the jurisdiction of the bankruptcy court in the administration of the affairs of insolvents **is exclusive of all other courts.**"

While in the case of U. S. F. & G. Co. vs. Bray (225 U. S. 205, 32 S. C. R. 620) this court was dealing with a suit brought after an adjudication of bankruptcy had taken place, we think certain expressions in that opinion are pertinent. After citing various sections of the Bankruptcy Act, Justice Van Devanter said:—

> "We think it is a necessary conclusion from these and other provisions of the act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts, and that such proceedings include, among others, all matters of administration, such as the allowance, rejection and reconsideration of claims, the reduction of the estate to money, its distribution, the determination of preferences and priorities to be accorded to claims presented for allowance and payment in the regular course, and supervision and control of the trustees and others who are employed to assist them."

The point was made that the suit (pending in the Federal Circuit court) was brought with the express leave of the Court of Bankruptcy and that for that reason it should not be stayed. On that subject Justice Van Devanter said:—

> "Of the fact that the suit was brought in the Circuit Court with the express leave of the Court of Bankruptcy, it suffices to say that the latter was not at liberty to surrender its exclusive control over matters of administration or confide them to another tribunal."

In the case of Griffin v. Lenhart, 266 Fed. 671 (CCA 4th), cited by appellants, the lien involved was acquired by the levy of an attachment issued in

conjunction with an ordinary action at law for the recovery of a debt evidenced by negotiable notes. "Non-residence" was the ground upon which the attachment was issued and only by levying the attachment upon the property of the defendant did the court obtain jurisdiction and only by preservation of the levy could the court retain its jurisdiction. While it is evident that that proceeding was in no sense a general creditors suit, nor winding up suit, there are some statements in the opinion, written by the late Judge Woods, which may be pertinent to a consideration of the question involved in this case. In that case Judge Woods said that the apparent conflict in the decisions of the Circuit Courts of Appeal is all due to a failure to note the distinction between cases where a lien is obtained **by virtue of the pending** proceeding and cases where no lien is obtained by the pending proceeding. He said, further, that on careful analysis it will turn out that the decisions are "entirely consistent with each other" and that the distinction is this:

> "Where a state court has obtained complete jurisdiction by hostile proceedings, which creditors have instituted for the enforcement of their demands, and **in which** creditors have acquired liens on the property more than four months before the filing of the petition in bankruptcy, the disposition of the property for payment of the liens should be left to the State court without interference from the court of bankruptcy."

In the opinion Judge Woods discusses Commercial Trust and Savings Bank v. Bush-Grace Company, 228 Fed. 300 (CCA 6th), which involved a creditors suit instituted more than four months

before the filing of the petition in bankruptcy, saying:—

> "The State court had ordered a reference to ascertain creditors, but had not taken custody by a receiver or otherwise of the property when the petition in bankruptcy was filed June 2nd, 1915. It was held that the bankruptcy court had exclusive jurisdiction, for the distinguishing reason that the **proceedings** in the State court, under the law of Tennessee, **did not constitute a lien**: that there was no prior lien and no custody of the property by the State court. Thus the court expressly distinguished the case from that of Pickens vs. Roy and Metcalf vs. Barker."

The same distinction was recognized by the Circuit Court of Appeals of the Sixth Circuit in the case of Miller vs. Potts (1928) 26 Fed. (2nd) 851. Under the law of Tennessee when a creditors suit is instituted no lien is thereby created until after the court has sustained a motion to make it a general creditors bill. And this is true whether the creditors have judgment or not. To have it made a general creditors bill it is necessary that there be a showing of insolvency. After that is shown the court enters an order making it a general creditors bill which creates a lien for the **equal benefit** of all creditors. In that case on September 14th, 1926, a motion was made to "sustain the bill as a general creditors bill", which was denied. Nothing further was done until May 3rd, 1927, when a supplemental bill was filed and a motion made to sustain the bill as a general creditors bill. That motion was sustained on May 14th, 1927, and at the same time a receiver was appointed. On June 1st, 1927, an involuntary peti-

tion in bankruptcy was filed. On application being made to the State court to surrender the property it declined to do so. Thereupon an application was made to the United States District Court for an order on the receiver requiring him to surrender the property, which was granted. On appeal the holding of the District Court was affirmed. Discussing the contention of appellant the court said in its opinion:—

> "But appellant urged that under the original bill, filed ten months before the bankruptcy petition, a valid lien for all creditors was obtained and the State court, which the took control of the property to effectuate that lien, cannot be ousted of jurisdiction, possession or control. **If the bill was such that a lien was thereby then acquired, the contention would be sound.** Blair vs. Brailey (CCA) 221 Fed. 1; Cf. Graham Mfg. Co. vs. Davy Poca. Coal Co. (CCA 4th) 238 Fed. 488."

Where the filing of the bill has created a lien and such lien is more than four months old it is expressly preserved by the terms of Section 67-c. Under such circumstances disposition of the property is made pursuant to, and not contrary to, the Bankruptcy Act. And where the lien is for the equal benefit of all creditors, it is also within the spirit of the Act. The filing of the bill in the instant case did not create a lien and there was no subsequent order creating a lien for the equal benefit or all creditors and no such order could have been entered under the provisions of our statute, (Sec. 7, Ch. 139, 1923 Code). Only by the appointment of a Receiver can a general lien for the equal benefit of all creditors be established in West Virginia and, when that is done, it is effective only against judgments ob-

tained after the appointment. All judgments taken up to the time of the appointment retain their priority in date order.

In Griffin vs. Lenhart the attachment was levied only upon part of the debtor's property and, as stated, the main action was one of assumpsit. We do not contend that an attachment proceeding which is ancillary to an action at law or to a suit in equity to recover a debt should necessarily be stayed, because neither the main action nor the attachment has for its objective the general administration of the property of the bankrupt and the attachment is inchoate and dependent upon the successful prosecution of the main action. However, if after the successful prosecution of the main action and the perfecting of the inchoate lien, the enforcement of the perfected lien materially embarrasses the court of bankruptcy, or results in a distribution of the property of the bankrupt contrary to the provisions of the Acts of Congress, we contend that the court of bankruptcy has both the power and the duty to stay **enforcement** of the lien and to take over the administration of the property, giving proper recognition to the perfected lien. In actual practice, this takes place constantly, particularly with respect to attachments and distress levies obtained before Justices of the Peace, which attachments and levies, when regular, are given their proper priority by the Referee like all other liens; and in actual practice similar attachments in the Circuit Court are so managed, without challenge, thus avoiding dual administration, with its consequent embarassment to and conflict with the bankruptcy

court. But if the contention of appellants is sustained the bankruptcy court will be continually embarassed by separate administrations even down to attachments and distress warrant proceedings of Justices of the Peace. It may be conceded that in occasional instances it might be deemed expedient for the court of bankruptcy to permit the State court to dispose of property. For instance, where the proceedings have been almost terminated and the enforcement of the decree and the distribution of the money **does not violate any of the provisions of the Acts of Congress relating to bankruptcy.** But to permit the State court to administer the estate after bankruptcy, **in accordance with the State law** and **in total disregard** of the priorities and order of distribution prescribed by the bankruptcy statutes, we submit, nullifies both the Constitution and the Acts of Congress. In this particular case under the State statute:

> All judgments, regardless of date, are liens and take priority by date of rendition. Section 67-f avoiding judgments obtained within four months is made a nullity. Section 60 is also nullified.
>
> The priority given to workmen, clerks and traveling salesmen by Section 64 is likewise nullified.
>
> Creditors are deprived of the right to participate in the administration of the estate. The loss of this right is of great importance in a case involving an estate of the character and value of this estate.

Unfortunately the certificate of the Court of Appeals omits many facts which we think are per-

suasive. However, we assume it is proper to submit the following as possible additional situations which may arise or exist when an adjudication of bankruptcy occurs and the Federal Court is denied the right to enjoin the prosecution of a creditors suit.

1. A case where the estate is an industrial plant situate in two States, on adjoining lands, with all the raw materials in one State on leased lands, with interdependent parts of the plant, equipment and buildings in each State, and with the only available railroad not located in the State in which the raw materials are, and accessible only by crossing the lands owned outright by the bankrupt in the other State.

2. Where some of the liens attach to property in one State, some to property in the other State, and some to property in both States.

In such a situation what court is there that can effectively, economically, without sacrifice of the property and with such speedy justice administer the estate? Only the Court of Bankruptcy has the power to sell all of the property in both States at one time, and the power and machinery to promptly and economically marshal all of the liens and administer the estate promptly and equitably. (Robertson v. Howard, 229 U. S. 254; 33 S. C. R. 854).

We assume that in presenting our case it is also fair to consider along with the other actualities, which are treated above as possibilities, the fact that the Trustee in Bankruptcy might be lawfully and properly in actual possession of the property. Under this court's decision in the case of Harkin v. Brund-

age, 276, U. S. 36, 48 S. C. R. 268, existence of this situation, we think, might alone, and without reference to anything else, confer upon the Bankruptcy Court the right to enjoin any act of others affecting the possession or title of the Trustee in Bankruptcy. In citing this case as authority for their position appellants ignore the fact that this court directed the return of the property to the State Court Receiver because possession was fraudulently obtained by the Federal Receiver.

Although we have read all of the cases cited by appellants, we have not undertaken to discuss all of them in this brief because we know that upon reference to them this court will very quickly see that they are not applicable to this case. We wish to call attention, however, to the case of Abney-Barnes Co. v. Davy Pocahontas Coal Co., 83 W. Va. 292, 98 S. E. 298, in which it is apparent that careful consideration was not given to the question involved in this case and it was decided before the Circuit Court of Appeals passed on the same question in the case of Graham Mfg. Co. vs. Davy Pocahontas Coal Co., supra.

In the Circuit Court of Appeals and throughout their brief in this court appellants have proceeded upon the theory that the jurisdiction of the State Court and the Federal Court is concurrent. We respectfully submit that this is an erroneous theory and that, in fact, upon an adjudication of bankruptcy the Court of Bankruptcy acquires exclusive jurisdiction over the property of the bankrupt, and that it may enjoin any proceeding pending in a State court, having for its purpose, or resulting in, the adminis-

tration of the property of the bankrupt in accordance with State laws; or any proceeding which obstructs it in the performance of its duty to administer the estates of bankrupts pursuant to the Acts of Congress relating to bankruptcy.

As heretofore stated, we concede that there may be cases when from both a practical and equitable standpoint it is neither necessary nor advisable to enjoin proceedings pending in a State court. By the terms of Section 2 of the Acts of Congress relating to bankruptcy and through its inherent power as a court of equity, the Bankruptcy Court may, and undoubtedly will, exercise discretion in granting or refusing injunctions, and its rulings will be reviewable in cases of abuse. But as matters stand now the right to grant an injunction at all is denied and it is respectfully submitted that until this court definitely re-affirms that upon an adjudication of bankruptcy Courts of Bankruptcy acquire exclusive jurisdiction over the property of bankrupts, there will be no end to the numerous and continually recurring cases of alleged "conflict of jurisdiction". So long as there is supposed "concurrent jurisdiction" this issue will remain a live one.

Respectfully submitted,

E. A. HANSBARGER,
ARTHUR F. KINGDON,
Counsel for Appellees.

APPENDIX

§ 7. Suits to enforce judgment; parties; notice to lienholders; sales of real estate; distribution of proceeds.—The lien of a judgment my be enforced in a court of equity after an execution of fieri facias thereon has been duly returned, to the office of the court or to the justice from which it issued, showing by the return thereon that no property could be found from which such execution could be made; Provided, That such lien may be enforced in equity without such return, when an execution or fieri facias has not issued within two years from the date of the judgment. If it appear to such court that the rents and profits of the real estate subject to the lien will not satisfy the judgment in five years, the court may decree the said estate, or any part thereof, to be sold and the proceeds applied to the discharge of the judgment. In every such suit all persons having liens on the real estate sought to be subjected by judgment or otherwise, shall be made parties, plaintff or defendant, or if the number of such persons exceed ten the suit may be brought by any one or more of them, for the benefit of himself and such other lien holders as will come in and contribute to the expenses of the suit. And whether the suit be so brought or not, every such lien holder, whether he be named as a party to the suit or not, or whether he be served with process therein or not, may present, prove and have allowed any claim he may have against the judgment debtor, which is a lien on such real estate, or any part thereof, and from and after the time he presents any such claim he shall be deemed a party plaintff in such suit. No decree for the distribution of the proceeds of such real estate shall be made until a notice to all persons holding liens on the

real estate of the judgment debtor be posted and published, under a decree of the court, as hereinafter provided. Such notice shall be sufficient if it be to form or effect as follows:

To all persons holding liens by judgment or otherwise, on the real estate, or any part thereof, of A.....B.....:

In pursance of a decree of the circuit court of.....county, made in a cause therein pending, to subject the real estate of the said A..... B.....to the satisfaction of the liens thereon, you are hereby required to present all claims held by you and each of you against the said A..... B....., which are liens on his real estate, or any part of it, for adjudication to me, at my office in the county (or city, town or village, as the case may be), of....., on or before the.....day of.....

Given under my hand this....day of.....

C..... D....., commissioner.

Such notice shall be published once in each week, for four successive weeks, in some newspaper printed in the county, or if none be printed therein, in some newspaper of general circulation in the county, and posted at the front door of the court house of such county at least four weeks before the day mentioned in the notice; and such publishing and posting of such notice shall be equivalent to the personal service thereof on all persons holding liens on any such real estate, unless the court shall in the decree directing such notice to be so published and posted otherwise order. The commissioner to whom the case is referred by such decree shall, as soon as possible after the said notice is published and posted as aforesaid, or served in such manner as the court may order, proceed to ascertain and

report all the liens on the real estate or any part threof of the judgment debtor, the holders of such liens, the amount due to each, and the priorities thereof, and such other matters and things as the court by its decree may direct, and the same proceedings shall be had on such report as in other suits in chancery. When the report of such commissioner is confirmed, if the claims therein reported (if any) be not paid, the court shall decree that the real estate of the judgment debtor, subject to such lien or liens, so far as may be necessary, shall be rented or sold, and the proceeds thereof distributed among the several lien holders who have appeared and proved their liens and claims, according to their several priorities (if any); which decree shall be a bar to the claim of any lien holder who has not appeared and presented his claim to said commissioner, as required by said notice, except that if a surplus remain after the payment of the claims so presented and proved, and confirmed by the court, the lien holder so failing to appear may share in such surplus, upon proving his claim at any time before a final decree in the case, in such manner as the court shall direct. But if he fail to present his claim before such final decree, he shall be forever barred of all right to participate in the proceeds of such real estate so far as the other creditors of said judgment debtor, holding liens on his real estate, who have not so failed, are concerned, and so far as the creditors at large of such judgment debtor are concerned. If pending any such suit, a judgment at law be recovered by any person against such judgmen. debtor, such person may present his claim to the commissioner and have it adjudicated and allowed in the same manner and to the same extent as if the judgment had

been obtained before the institution of such suit. And he may present such claim to the court after the report is made, and before the entering of a decree distributing the proceeds of the sale of such real estate, and have the same adjudicated and passed upon by the court, and if found to be correct and a lien upon such real estate, the court shall allow and confirm the same, and provide for the payment thereof in the decree of sale and distribution. If after the commencement of such suit, any lien holder commence any other suit or proceeding in or out of court to enforce a lien claimed by him on the real estate, or any part thereof, of the judgment debtor, upon which a lien is sought to be enforced by such suit, the court, or the judge thereof in vacation, may enjoin him from so doing, and require him to come in and assert his lien in such suit, or make such order or decree in relation thereto as to such court or judge may seem right and proper to protect the interest of all parties having liens. (Acts 1872, c. 30; 1882, c. 126; 1891, c. 95.)

EXCERPTS CITED FROM ACTS OF BANKRUPTCY

§ 2. That the courts of bankruptcy as hereinbefore defined, namely, the district courts of the United States in the several States, the Supreme Court of the District of Columbia, the district courts of the several Territories **and possessions to which this Act is, or may hereafter be, applicable,** and the United States court in the district of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as

will enable them to exercise original jurisdiction in bankruptcy proceedings, ****

§. 2. (15) make such orders, issue such such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act; ****

Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

§ 67. c. A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefitted thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened.

§ 67. f. That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry.

SUPREME COURT OF THE UNITED STATES.

No. 137.—October Term, 1930.

Joseph B. Straton, et al., Special Commissioners of the Circuit Court of Mingo County, West Virginia, *vs.* Andy New, Jr., Trustee in Bankruptcy of Fall Branch Coal Co., et al.	On Certificate from the United States Circuit Court of Appeals for the Fourth Circuit.

[April 20, 1931.]

Mr. Justice Roberts delivered the opinion of the Court.

The District Court for Southern West Virginia entered an order in the bankruptcy of the Fall Branch Coal Company enjoining commissioners appointed by a West Virginia state court from proceeding with the sale of certain real estate of the bankrupt pursuant to a decree of that court. The petitioners were the trustee in bankruptcy and two mortgagees.

The petition alleged that the commissioners were advertising for sale only the property of the bankrupt in West Virginia, that it would be advantageous to all parties to have this property sold with property of the bankrupt situate in Kentucky, and that the bankruptcy court had exclusive jurisdiction to make the sale. The respondents in their answer denied the right of the District Court to enjoin the proceedings in the state court, and appealed from an order awarding an injunction.

April 11, 1927, one Alley obtained judgment against the coal company in the Circuit Court of Mingo County, West Virginia, which was docketed May 5, 1927, and thus became a lien on its real estate in that county. February 20, 1928, Alley filed in the same court a judgment creditors' suit against the coal company, and made parties thereto all creditors having liens against its real estate, including the two mortgagees who were co-petitioners with the trustee in the bankruptcy court. In his bill he prayed that the liens and assets be marshalled and that the company's real estate be sold and the proceeds distributed among the lien claimants according to their respective rights. The cause was

duly matured and, at April term, 1928, was referred to a commissioner in chancery to report the real estate owned by the debtor and the liens thereon. At the July term, 1928, the commissioner presented his report, and thereupon the respondents were appointed to make sale of the property. August 4, 1928, sixteen months after rendition of Alley's judgment, and five and one-half months after the filing of the creditors' bill, the coal company filed its voluntary petition in bankruptcy, and on October 11, 1928, while the commissioners of the state court were proceeding to carry out its order of sale, the petition was filed to enjoin them from further proceeding.

Upon these facts the question certified is:

Where creditors have obtained and docketed judgments constituting liens on the real estate of defendant, and have instituted a creditors' suit in a state court to marshal and enforce the liens and sell the real estate subject thereto, does the bankruptcy of defendant occurring more than four months after the institution of the creditors' suit oust the state court of jurisdiction, or vest in the court of bankruptcy power to enjoin further proceedings in the state court?

The purpose of the Bankruptcy Law, passed pursuant to the power of Congress to establish a uniform system of bankruptcy throughout the United States, is to place the property of the bankrupt, wherever found, under the control of the court, for equal distribution among the creditors. The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. This jurisdiction is exclusive within the field defined by the law, and is so far *in rem* that the estate is regarded as *in custodia legis* from the filing of the petition. *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300. It follows that liens cannot thereafter be obtained nor proceedings be had in other courts to reach the property, the district court having acquired the exclusive right to administer all property in the bankrupt's possession. *Lazarus* v. *Prentice*, 234 U. S. 263. *White* v. *Schloerb*, 178 U. S. 542. *Murphy* v. *John Hofman Co.*, 211 U. S. 562. *U. S. F. & G. Co.* v. *Bray*, 225 U. S. 205. *Hebert* v. *Crawford*, 228 U. S. 204. It may inquire into the validity of liens, marshal them, and control their enforcement and liquidation. *Isaacs* v. *Hobbs Tie & Timber*

Co., 282 U. S. —, and authorities cited; *Whitney* v. *Wenman*, 198 U. S. 539. Remington, Bankruptcy (3rd Ed.) § 2472.

Though a lien be not discharged by bankruptcy, its owner may not, without the bankruptcy court's permission, institute proceedings in a state court to enforce it, since his so doing might interfere with the orderly administration of the estate. Thus a mortgagee will be restrained from instituting or proceeding further in a foreclosure action, begun after the date of the petition in bankruptcy.[1] And a creditor holding a valid judgment more than four months old will be enjoined from enforcing its lien by suit brought after the date of the petition.[2] And as the lien created by a judgment entered within four months is avoided, the court of bankruptcy has jurisdiction to administer the property regardless of the lien and will restrain the prosecution of an action to enforce it.[3]

The bankruptcy law contains no express provision preserving liens acquired by legal proceedings more than four months before the petition is filed. But it is clearly implied that they shall be saved from the operation of the law, for § 67 (f)[4] voids only liens obtained by legal proceedings within that period. It has consequently been held that those acquired earlier, if valid under state law, are preserved, and will be accorded priority by the bankruptcy court in distribution of the estate, in accordance with applicable local law.[5]

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[1] *Isaacs* v. *Hobbs Tie & Timber Co.*, *supra*. *In re Pittelkow*, 92 Fed. Fed. 901. *In re Ball*, 118 Fed. 672. *In re Jersey Island Packing Co.*, 138 Fed. 625. *In re Zehner*, 193 Fed. 787. *In re Hasie*, 206 Fed. 789. *Matthews* v. *Webre Co.*, 213 Fed. 396; affirmed *sub. nom. Pugh* v. *Loisel*, 219 Fed. 417 (cert. denied, 238 U. S. 631). *McLoughlin* v. *Knop*, 214 Fed. 260. *Cohen* v. *Nixon & Wright*, 236 Fed. 407. *In re Larkin*, 252 Fed. 885. *In re North Star Ice & Coal Co.*, 252 Fed. 301. *In re U. S. Chrysotile Asbestos Co.*, 253 Fed. 294. *In re Oswegatchie Products Co.*, 279 Fed. 547. *Brown Shoe Co.* v. *Wynne*, 281 Fed. 807. *First Trust Co.* v. *Baylor*, 1 F. (2d) 24. *In re Dyer*, 8 F. (2d) 376. *Allebach* v. *Thomas*, 16 F. (2d) 853. *In re Holstein Harvey Inc.*, 26 F. (2d) 798.

[2] *In re L'Hommedieu*, 146 Fed. 708. *In re Arden*, 188 Fed. 475. *In re Schow*, 213 Fed. 514.

[3] *Clark* v. *Larremore*, 188 U. S. 486. *In re Albright*, 18 F. (2d) 591. Remington, Bankruptcy (3d Ed.) § 1905.

[4] U. S. C., Tit. 11, § 107 (f).

[5] *In re Wood*, 95 Fed. 946; *In re L'Hommedieu*, 146 Fed. 708; *In re Koslowski*, 153 Fed. 823; *In re Torchia*, 185 Fed. 576; *In re Randolph*, 187 Fed. 186; *In re Zeis*, 245 Fed. 737; *In re Fraser*, 261 Fed. 558.

There is no dispute concerning these propositions. Appellants, however, assert that the jurisdiction in bankruptcy to ascertain, marshal and enforce liens, is not exclusive, but concurrent with that of other courts competent to that end, if the liens in question are not discharged but recognized as valid in bankruptcy, and that the rule of comity is applicable that the court first lawfully taking jurisdiction shall retain it. *Wabash R. R.* v. *Adelbert College,* 208 U. S. 38. *Harkin* v. *Brundage,* 276 U. S. 36. They contend that when the petition was filed in this case, the state court was proceeding in a suit within its jurisdiction and had taken possession of the *res* for the purpose of enforcing such a lien.

The certificate states that the judgment of the plaintiff in the creditors' suit constituted a lien on real estate from a date sixteen months prior to the initiation of the bankruptcy proceeding. It is obvious that it and any other judgments involved in that suit, and the mortgage liens which were to be marshalled in it, including those of the two mortgagees who joined in the petition for injunction against further action by the state court, were valid notwithstanding the bankruptcy, because the creditors' suit was filed five and one-half months before the petition in bankruptcy, and all such other judgments and liens must then have been in existence and matured, or they would not have been proper subjects for the state court's action.

If appellants are correct in their contention that the creditors' suit was no more than a proceeding to enforce liens saved from discharge by the subsequent bankruptcy of the debtor, it follows, as they claim, that the District Court sitting in bankruptcy had no power to enjoin that action.

In *Metcalf* v. *Barker,* 187 U. S. 165, Lesser Brothers were adjudged bankrupts on their own petition, on May 12, 1899. They had on October 2, 1896, being insolvent, transferred all their property, partnership and individual, to certain favored creditors. On October 22, 1896, and October 29, 1896, Metcalf recovered judgments in the Supreme Court of the State of New York against the Lessers, upon which executions were issued and returned unsatisfied. On December 17, 1896, Metcalf commenced a judgment creditors' action in the Supreme Court of New York, which came to trial on December 17, 1897, as a result whereof the transfers were adjudged fraudulent and void as to plaintiff. The transfers

had involved both personal property and real estate. The judgment of the court set aside the transfers of personal property and of the real estate in favor of the plaintiff. Meantime receivers had been appointed for the Lessers and the judgment of the Supreme Court determined that the tangible property and its proceeds then in the hands of the receivers, and certain claims by the receivers, were to be administered by them for the benefit of the creditors of the partnership, including Metcalf, while the real estate involved became subject to the lien of the judgments of Metcalf as of October 22 and 29, 1896.

From this judgment there were appeals, as a result of which the decree in favor of Metcalf did not become final until March 12, 1900. On March 8, 1900, the trustee in bankruptcy procured from the United States District Court an order on Metcalf to show cause why an injunction should not issue enjoining him from taking any further proceedings under any judgment in the creditors' action. Objection was made to the jurisdiction of the court, which was overruled, and the injunction made permanent. Metcalf presented a petition to revise to the Circuit Court of Appeals, which certified to this Court certain questions, amongst others, whether the District Court had jurisdiction to make the injunction order, and whether Metcalf, by the commencement of the creditors' action, acquired a lien on the property of the bankrupts superior to the title of the trustee. This Court answered that the District Court had no jurisdiction, and that Metcalf did acquire such a lien.

The bill was a technical creditors' bill; its purpose was to subject equitable assets to the lien of a judgment which the judgment did not bind at law. This Court held that the lien when established related back to the date of the filing of the bill, which was much more than four months before the initiation of the cause in bankruptcy. It was urged that at the date of bankruptcy the claim was contingent and was only an equitable lien, and that in truth and in substance the judgment was recovered within four months of bankruptcy, and under § 67 (f) must be declared null and void. This Court overruled the contention, quoted § 67 (f), and said (p. 174):

"In our opinion the conclusion to be drawn from this language is that it is the lien created by a levy, or a judgment, or an attachment, or otherwise, that is invalidated, and that where the

lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. . . . . A judgment or decree in enforcement of an otherwise valid preexisting lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens."

In *Clarke* v. *Larremore*, 188 U. S. 486, a judgment was recovered, but did not constitute a lien on the debtor's personal property. Within four months prior to the filing of a bankruptcy petition the judgment creditor issued execution under which levy was made on the debtor's goods. It was held that the levy and the sale thereunder were avoided. The Court said: "The judgment in favor of petitioner against Kenney was not like that in *Metcalf* v. *Barker*, . . . one giving effect to a lien theretofore existing, but one which with the levy of an execution issued thereon created the lien, . . ."

In *Globe Bank* v. *Martin*, 236 U. S. 288, the Court said: "The difference, having the provisions of the act in view, between the beginning of a proceeding to assert liens that existed more than four months before the filing of the petition in bankruptcy, and the attempt to create them by attachment or other proceedings within four months, has been recognized in decisions of this court" (citing *Metcalf* v. *Barker*).

Following these cases the federal courts have with practical unanimity held that where a judgment which constitutes a lien on the debtor's real estate is recovered more than four months prior to the filing of the petition, the bankruptcy court is without jurisdiction to enjoin the prosecution of the creditor's action, instituted prior to the filing of a petition in bankruptcy, to bring about a judicial sale of the real estate.[6]

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[6] *White* v. *Thompson*, 119 Fed. 868; *In re Koslowski*, 153 Fed. 823; *In re Pilcher*, 228 Fed. 139; *In re Brinn*, 262 Fed. 527; *In re Maddox*, 280 Fed. 227; *In re Thompson*, 288 Fed. 385; *In re Berlowe*, 7 F. (2d) 898; *Wilkinson* v. *Goree*, 18 F. (2d) 455; *In re Van Blokland*, 20 F. (2d) 1016; *In re Conservative Mtge. & Guaranty Co.*, 24 F. (2d) 38; *Whitney* v. *Barrett*, 28 F. (2d) 760. Compare *Blair* v. *Brailey*, 221 Fed. 1; *Brown Shoe Co.* v. *Wynne*, 281 Fed. 807. See also, *Hillyer* v. *LeRoy*, 179 N. Y. 369. *Contra: In re Baughman*, 138 Fed. 742. It is also well settled that where an attachment is levied more than four months prior to bankruptcy, the prosecution of the claim to judgment and sale within the four months will not be enjoined or the sale set aside. *In re Blair*, 108 Fed. 529; *In re Beaver Coal*

The trustee in bankruptcy may intervene in such suits to protect the interests of the estate.[7]

It is clear that if the action in the state court was merely in the nature of an execution or proceeding to obtain the avails of the judgment lien it should not have been enjoined by the district court.

The appellees, however, insist that the purpose and function of the creditors' bill was a general disposition and distribution of the debtor's property; that it was a winding up proceeding pursuant to state law, and was therefore superseded by the bankruptcy. They invoke the settled rule that state insolvency laws which are tantamount to bankruptcy because they provide for an administration of the debtor's assets and a winding up of his affairs similar to that provided by the national act are suspended while the latter remains in force, and proceedings under them are utterly null and void whether commenced within four months of the filing of a petition in bankruptcy or before. *Sturges* v. *Crowninshield*, 4 Wheat. 122; *Mayer* v. *Hellman*, 91 U. S. 496; *Hanover Nat. Bank* v. *Moyses*, 186 U. S. 181; *Miller* v. *New Orleans Ferti-*

Co., 110 Fed. 630; *In re Snell*, 125 Fed. 154; *In re Kane*, 152 Fed. 587; *In re Crafts-Riordon Shoe Co.*, 185 Fed. 931; *In re Shinn*, 185 Fed. 990; *Yumet* v. *Delgado*, 243 Fed. 519; *Griffin* v. *Lenhart*, 266 Fed. 671; *In re Norris*, 283 Fed. 860; *In re Houtman*, 287 Fed. 251; *In re Thompson*, 288 Fed. 385; *Gatell* v. *Millian*, 2 F. (2d) 365. *Contra: In re U. S. Graphite Co.*, 161 Fed. 583. On similar grounds the bankruptcy courts refuse to enjoin the prosecution of foreclosure proceedings under a mortgage, the lien of which is preserved in bankruptcy, if initiated prior to the date of the petition. *Eyster* v. *Gaff*, 91 U. S. 521; *In re Gerdes*, 102 Fed. 318; *Carling* v. *Seymour Lumber Co.*, 113 Fed. 483; *In re McKane*, 152 Fed. 733; *Sample* v. *Beasley*, 158 Fed. 607; *In re Pennell*, 159 Fed. 500; *In re Rohrer*, 177 Fed. 381; *In re Wagner's Est.*, 206 Fed. 364; *In re Schmidt*, 224 Fed. 814; *Amer. Trust Bank* v. *Ruppe*, 237 Fed. 581; *Duncan* v. *Girand*, 276 Fed. 554; *Louisville Realty Co.* v. *Johnson*, 290 Fed. 176; *In re Iroquois Utilities, Inc.*, 297 Fed. 397; *Ft. Dearborn Tr. & Sav. Bank* v. *Smalley*, 298 Fed. 45; *In re Smith*, 3 F. (2d) 40; *In re Gillette Realty Co.*, 15 F. (2d) 193; *In re Hurlock*, 23 F. (2d) 500; *In re Simpson*, 31 F. (2d) 317; *Bushong* v. *Theard*, 37 F. (2d) 690; certiorari denied, 281 U. S. 763; *In re Marts*, 38 F. (2d) 283. *Contra: In re Dana*, 167 Fed. 529; *In re Kaplan*, 144 Fed. 159; *First Savings Bank* v. *Butler*, 282 Fed. 866.

[7] § 11 (b); U. S. C., Tit. 11, § 29; *In re Porter*, 109 Fed. 111; *In re New England Breeders' Club*, 175 Fed. 501; *In re Kearney Bros.*, 184 Fed. 190.

lizer Co., 211 U. S. 496; *Stellwagen* v. *Clum*, 245 U. S. 605; *International Shoe Co.* v. *Pinkus*, 278 U. S. 261.

It was pointed out in *Stellwagen* v. *Clum, supra*, that state laws which provide for sale and distribution of a debtor's property may not amount to insolvency laws; and it was there held that such laws, if not inconsistent with the administration of the bankruptcy act, are available to litigants. Appellees must therefore show that the statutory action in the state court is, in fact, an insolvency proceeding. The certificate states no facts which lead to such a conclusion, nor does it so denominate the creditors' suit. Reference to the statutes of West Virginia, of which we take judicial notice, demonstrates that it is not in that category.

In that State a judgment is a lien on the debtor's real estate as against all except *bona fide* purchasers for value without notice, and as against the latter from the date of docketing it in the county where the land lies.[8] The debtor's real estate cannot be sold under execution. *In re McGraw*, 254 Fed. 442. The plaintiff must resort for enforcement of his judgment against real estate to such a proceeding as is described in the certificate.[9] He may do so without exhausting his legal remedies, as against personal property.[10] The statute provides for a course of procedure such as is described in the certificate,—namely, that the liens and the debtor's real estate shall be determined by a commissioner appointed by the court and, if the claims which he reports be not paid, a decree shall be made for a sale of the real estate subject to the liens so far as may be necessary to pay them according to their priorities, if any.

[8] Code 1849, c. 186, § 6; Code 1860, c. 186, § 6; Code 1868, c. 139, § 5; 1882, c. 126, § 5; Code 1923, c. 139, § 5; Code 1931, c. 38, art. 3, § 6; *In re McGraw*, 254 Fed. 442. And execution is not needed to make the judgment such a lien. *Maxwell* v. *Leeson*, 50 W. Va. 361.

[9] "The lien of a judgment may be enforced in a court of equity after an execution or fieri facias thereon has been duly returned to the office of the court or to the justice from which it issued showing by the return thereon that no property could be found from which such execution could be made: *Provided*, That such lien may be enforced in equity without such return when an execution or fieri facias has not issued within two years from the date of the judgment." . . . Code 1849, c. 186, § 9; Code 1860, c. 186, § 9; Code 1868, c. 139, § 8; 1872, c. 30; 1882, c. 126, § 7; 1891, c. 95, § 7; Code 1923, c. 139, § 7; Code 1931, c. 38, art. 3, § 9.

[10] *Price* v. *Thrash*, 30 Grat. 515. (The statutory provision of West Virginia is taken from that of Virginia: Code (Va.) 1849, p. 709, c. 186, § 9.)

If a lien-holder, after notice has been given of the proceeding as required by the statute, does not appear and present his claims he is barred from participation, except that if a surplus remain after the payment of claims presented he may share in such surplus upon proving his claim at any time before final decree. There is also a provision for the presentation and participation of lien claims where judgment has been recovered before final decree in the creditors' action. This statute says nothing about a distribution of assets amongst general creditors. It contains no provision that lien claims presented which cannot be paid because the proceeds of the sale are insufficient shall be wiped out as debts of the defendant. It does not purport to discharge the debtor from his indebtedness generally. It is merely a proceeding in equity to do what would be done by a sheriff or marshal under an appropriate writ for the sale of real estate in execution at law. *In re McGraw, supra.* Such officer upon receiving the proceeds of a judicial sale would under the supervision of the court pay them to those whose liens were discharged by the sale. He would marshal the liens against the proceeds precisely as this statute directs the chancellor to do. The act is in no sense an insolvency statute, and a proceeding thereunder is not therefore avoided by the adjudication of the debtor as a bankrupt. On the contrary, it is a mere proceeding to enforce a valid lien or liens against the real estate bound thereby, and falls within the rule announced in *Metcalf* v. *Barker, supra.*[11] This is the view of the Supreme Court of West Virginia, which has held that the action is merely one to enforce liens, and that where the bankruptcy of the debtor occurred six months after its institution, it need not be stayed, since the state court which had first acquired jurisdiction was entitled to proceed to final decree. *Abney Barnes Co.* v. *Davy-Pocahontas Coal Co.*, 83 W. Va. 292.

It is suggested that the commissioners appointed by the state court were in effect receivers, and it was stated in argument that they did not qualify by giving bond until within four months of the filing of the petition in bankruptcy, and that therefore the

[11]The bill in *Metcalf* v. *Barker* was a true creditors' bill, seeking to make available to a judgment creditor assets which could not be reached by an execution at law. *Jones* v. *Green*, 1 Wall. 330; *Dunphy* v. *Kleinschmidt*, 11 Wall. 610, 614; *Taylor* v. *Bowker*, 111 U. S. 110, 116; *National Tube Works Co.* v. *Ballou*, 146 U. S. 517. The bill in this case assumes the existence of the lien on the property and is a mere measure to enforce it.

state court action should be enjoined and the property taken into possession of the bankruptcy court. But as above said, the statute of West Virginia merely substitutes these commissioners for the usual judicial officer who makes a sale and reports the result thereof to the court.[12]

Assuming them to be receivers, their function is not that of an officer charged with winding up the affairs of the debtor, such as would cause a conflict with the bankruptcy law.[13] Moreover, we find nothing in the certificate to the effect that the commissioners had not qualified more than four months prior to the filing of the petition in the bankruptcy court.

The appellees rely upon *In re Watts*, 190 U. S. 1. But that case does not support their contentions. It is sufficient to say that there a state court made an order appointing a general receiver for a corporation. He proceeded to inventory and appraise the assets of the debtor, asked for orders requiring the creditors to prove their claims, and was proceeding to a complete winding up. Within a month and a half after the appointment a petition in bankruptcy was filed. This Court said:

"We do not understand it to be contended that the passage of the bankruptcy act in itself suspended the statute of Indiana in relation to the appointment of receivers, but only that when the proceedings for such appointment took the form, as they did here, of winding up the affairs of the insolvent corporation, the proceedings in bankruptcy displaced those in the state court and terminated the jurisdiction of the latter."

This was merely a statement of the well settled principle that a general winding up receivership is tantamount to an insolvency proceeding which will be superseded by bankruptcy, and, *a fortiori*, if, as in that case, the petition is filed within four months of the appointment of the receiver. The language quoted from that case by appellees respecting the paramount and exclusive jurisdiction of the court of bankruptcy must be read in connection with the facts on which it was predicated.

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[12]Code 1860, c. 178; Acts 1882, c. 142; 1899, c. 49; 1903, c. 15; 1915, c. 76. Code 1923, c. 132; Code 1931, c. 55, art. 12. See *In re McGraw, supra.*

[13]See *In re Smith*, 92 Fed. 135; *In re Lengert Wagon Co.*, 110 Fed. 927; *In re Storck Lumber Co.*, 114 Fed. 360; *In re F. A. Hall Co.*, 121 Fed. 992; *In re Salmon*, 143 Fed. 395; *In re Weedman Stave Co.*, 199 Fed. 948.

Most of the cases cited by the appellees to the effect that the initiation of bankruptcy proceedings confers on the district court jurisdiction to enjoin pending suits in state courts deal with the situation where a lien was acquired within four months of the filing of the petition, or where, after the filing of the petition an action was begun to enforce a lien valid in bankruptcy. As heretofore noted, there are a few cases which have held that the bankruptcy court may enjoin proceedings, brought prior to the filing of the petition, to enforce valid liens which are more than four months old at the date of bankruptcy;[14] but these cases are contrary to the decisions of this Court and to the great weight of federal authority.

The question is answered "No."

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[14]See Note 6, *supra.*